83 - 1197

No.

In the Supreme Court of the United States

October Term, 1983

GERALD A. MASON, et al.,
Petitioners,

vs.

BURGER KING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Decision of the Eleventh Circuit Court in Conflict With the Decisions of Several Circuits and This Court in *Gasoline Products, Inc. v. Champlin Refining*, 283 U.S. 494 (1931) Insofar As the Trial Judge Ordered a Partial New Trial on the Amount of Damages, When That Issue Was Clearly Not Distinct and Separable From the Issue of Liability?

II. Is the Decision of the Eleventh Circuit in Conflict With This Court's Decision in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 (1962), or a Substantial Deparature From the Law Set Forth Therein Insofar As the Trial Judge Failed to Seek a Resolution of the Jury's Answers Which Would Make Them Consistent?

LIST OF PARTIES

Allison Park Corp. #1
B-K Foods, Inc.
Burger King Corporation
Gerald A. Mason
Wesley Hardy
Donald Szabo
Richard D. Peterson
Dauphin Foods Corp. #1
Smithfield Corp. #2
Washington Corp. #1
Elkhart #1 Inc.
Southbend #1 Inc.
State College, P.A. #1 Inc.
Lafayette Corporation #1
Lafayette Corporation #2
Hardy Enterprises, Inc.

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BASIS FOR JURISDICTION

The judgment sought to be reviewed is dated August 1, 1983, and no time was recorded. Rehearing was denied on October 14, 1983. This petition is brought before this Court pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioners, GERALD A. MASON, WES HARDY, RICHARD PETERSON and DONALD SZABO, *et al.* held varying interests in Burger King franchises and development agreements. Suit was initiated by BURGER KING containing more than thirty counts whereby BURGER KING sought, *inter alia*, termination of certain development agreements in Pittsburgh, Pennsylvania and Kansas City, Missouri; cancellation of 26 franchise agreements, and the recovery of certain sums allegedly owed on promissory notes, royalties and the like. Counterclaims and affirmative defenses were set forth by the Petitioners.

The case was tried before a jury. The nature of the jury's findings, however, created certain problems. The The first problem related to findings regarding amounts owed. The claim of BURGER KING which was submitted to the jury in Special Issue #1 was based upon five promissory notes, with a principal balance in excess of $900,000 and accounts receivable in excess of $600,000. These amounts were not in dispute. Rather, the Petitioners, MASON, *et al.*, had presented certain defenses which, if successful, would have defeated liability.

The jury, however, ruled in favor of BURGER KING as to liability in regard to those items, but ignored the amounts in evidence. Instead of awarding a sum in excess of $900,000 on the promissory notes and $600,000 on the accounts receivable, the jury awarded $1.00 and $100,000.

Second, the jury's answers to certain special interrogatories appeared to be potentially inconsistent. In particular, the jury responded to Special Issue #5 as follows:

> "With respect to BURGER KING CORPORATATION's claims regarding termination of the franchise agreements, we the jury find that:
>
> "A. BURGER KING CORPORATION properly terminated all of the franchise agreements,.....
>
> "or
>
> "B. BURGER KING CORPORATION wrongfully terminated all of the franchise agreements,.....
>
> "or
>
> "(C.) BURGER KING CORPORATION properly terminated the franchise agreements covering the restaurants listed in Column 1 and wrongfully terminated the franchise agreements covering the restaurants listed in Column 2.

1	2
Franchise Agreements Terminated Properly	Franchise Agreements Terminated Improperly
	#463
None	
	#837
	#1127
	#1201
	#1360
	#1689
	#179
	#1863
	#1887
	#2024
	#2247
	#2249

*The jury's actual writing, with the crossing out of various numbers, is contained in the Appendix at p. A123. However, the response typed above is an accurate representation of what the jury did. The double lines indicate a number which was crossed out.

Subsequent to the jury verdict, BURGER KING filed a Motion for Clarification of the verdict with regard to Special Issues #1 and #2. It sought the entry of an Order awarding the full principal and interest of the Promissory Notes and an additional award of $1.00, and the full amount of the accounts receivable, plus interest, together with an additional award of $100,000.00. In the alternative, BURGER KING moved for the entry of Judgment Notwithstanding the Verdict seeking the full amount of the Promissory Notes and accounts receivable, together with interest thereon.

The Petitioners sought to uphold the jury's verdict, if at all possible, in accordance with the requirements of the Seventh Amendment. Petitioners proposed to the Court a possible explanation of the jury's verdict, in light of the entire case, which would have permitted the jury's verdict to stand in its entirety.

The District Court, by an Order dated October 31, 1980, denied BURGER KING's Motion for Clarification as to Special Issues No. 1 and 2 and further denied the Motion for Judgment Notwithstanding the Verdict as to Special Issues No. 1 and 2. The District Court, on its own motion, determined, however, that the jury's verdicts on those Special Issues decided the issue of liability against the Petitioners but the award of $1.00 on Promissory Notes in the principal amount of $900,000 (totalling in excess of $1,000,000, including interest), and $100,000 on accounts receivable with a book value of over $500,000 (actually totalling in excess of $600,000, including interest) was contrary to the weight of the evidence. The District Court then ordered that a new trial limited to the issue of damages only on these two claims would be held. BURGER KING's Motion for Judgment Notwithstanding the Verdict as to Special Issue No. 5 was denied. However, the

District Judge found that he could not ascertain the jury's response to Special Issue No. 5 regarding the franchises. Without addressing the meaning of the word "NONE" in the "Properly Terminated" column of Special Issue No. 5, the Court directed that a new trial be held with regard to *all* of Petitioners' franchises not specifically listed in the "Improperly Terminated" column.

Following the court's Order of October 31, 1980, the Petitioners moved for a new trial on all issues on the grounds that, given the District Court's rulings regarding Special Issues No. 1 and 2, the jury's verdict regarding those claims indicated a substantial possibility of juror misconduct or confusion, specifically an improper compromise verdict. The court denied the Petitioners' Motion for a New Trial and directed that the new trial would be limited to the issues set forth in the District Court's October 31, 1980 Order. Following the entry of this Order, the Petitioners moved the District Court to amend its Order to certify the order for Interlocutory Appeal, pursuant to 28 U.S.C. §1292(b). The District Court, by its Order dated February 24, 1981, denied this motion.

On March 6, 1981, BURGER KING moved for Partial Summary Judgment on the damages issues of its claims on the promissory notes and accounts receivable, which were the subject of Special Issues No. 1 and 2, which motion was supported by an affidavit updating the testimony introduced at the first trial concerning the balances due on these obligations as reflected by BURGER KING's books and records. The Petitioners opposed the motion on the same grounds as had been advanced in opposition to BURGER KING's Motion for Judgment Notwithstanding the Verdict on these same claims, incorporating all of the arguments advanced in opposition to that motion and the testimony from the first trial in support of those argu-

ments (regarding the existence and amount of offsets and credits). The District Court granted BURGER KING's motion on these claims, converting the jury's $1.00 award to $1,052,147.70 and the jury's $100,000 award to $711,544.77.

The second jury trial commenced on August 26, 1981. The second jury's verdict found that BURGER KING had properly terminated six of the seven franchise agreements which the jury had considered. Three of these franchises were terminated on grounds identical to those which the first jury held did not justify termination of several other franchises.

A bench trial was held on September 2, 1981 wherein it was held by the court that BURGER KING was not entitled to rescission of certain franchise agreements. On September 21-22, 1981, another trial was heard before the court wherein the court awarded the Petitioners' net profits to BURGER KING.

Following the entry of a final judgment, attorney's fees and costs, Petitioners filed their Notice of Appeal to the Eleventh Circuit on January 10, 1982, and BURGER KING cross appealed. After submission of briefs and hearing arguments, the Eleventh Circuit vacated the award of net profits, but affirmed the trial judge in all other respects.

The result in this case was that by virtue of the whittling away of the jury's province by the trial judge and the Eleventh Circuit,* a judgment highly favorable to the Petitioners was changed into a nightmare, a total judgment in excess of $3,000,000, and the loss of many franchises in which the Petitioners had invested for many years.

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*Jurisdiction was pursuant to 28 U.S.C. § 1291.

ARGUMENT

I.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF SEVERAL CIRCUITS AND THIS COURT IN *GASOLINE PRODUCTS, INC. v. CHAMPLIN REFINING*, 283 U.S. 494 (1931) INSOFAR AS THE TRIAL JUDGE ORDERED A PARTIAL NEW TRIAL ON THE AMOUNT OF DAMAGES, WHEN THAT ISSUE WAS CLEARLY NOT DISTINCT AND SEPARABLE FROM THE ISSUE OF LIABILITY.

The issue created by the factual circumstances cited above wherein the jury found in favor of BURGER KING but awarded minimal damages, was whether the trial judge erred in granting a partial new trial limited solely to the issue of the amount of damages. The position advanced by MASON was that granting a partial new trial was error in view of the jury's award of negligible sums in the face of findings in favor of BURGER KING on liability. MASON had submitted that the jurors' conduct was indicative of a compromise verdict, an agreement to rule in favor of BURGER KING but to award nominal damages, *especially* in view of the undisputed amounts asserted in relation to the claimed liability.

The panel which heard this case in the Eleventh Circuit denied MASON's position. It did so despite an initial restatement of the applicable law as follows:

> "It is axiomatic, however, that a partial new trial may not be granted if it would infringe upon a litigant's seventh amendment right to a jury trial. In Gasoline Products v. Champlin Refining Co., 283 U.S.

494, 513, 75 L.Ed. 1188 (1931), the Supreme Court enunciated the standard which governs partial new trial practice:

> [w]here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

"Id. at 500, 51 S.Ct. at 515, 75 L.Ed. at 1191. Applying Champlin Refining the former Fifth Circuit Court of Appeals held that a jury verdict influenced by an improper compromise cannot stand and a complete new trial is required because liability and damages are inseparable. See, e.g., Lucas v. American Manufacturing Co., 630 F.2d 291, 294 (5th Cir.1980); Hatfield v. Seaboard Air Line R.R. Co., 396 F.2d 721, 724 (5th Cir.1968). Hence, if there is a compromised finding on liability, a separate trial on damages alone will not suffice—both liability and damages must be litigated in a new trial." Id.

The nature of the decision of the appellate court is such that it meets some of the suggested bases for certiorari jurisdiction. Specifically, it is in direct conflict with decisions of this Court, the Fifth Circuit and the Second Circuit.

The basic rule regarding granting a partial new trial was set forth in *Gasoline Products, Inc. v. Champlin Refining*, quoted above. The meaning of that rule has been established by several decisions of the Fifth Circuit. In *Williams v. Slade*, 431 F.2d 605, 608 (5th Cir.1970), the court stated:

> "In other words, a court may properly award a partial new trial only when the issue affected by the error

could have in no way influenced the verdict on those included in the new trial. If the decision on the other issues could *in any way* have been infected by the error, then a new trial must be had on all issues." (Emphasis supplied)

The court in *Williams v. Slade* also quoted with approval the following passage:

"We have power in an appropriate case to remand only for redetermination of the amount of damages, excluding from the scope of a new trial the question of liability, see Washington Gas Light Company v. Connolly, 94 U.S. App.D.C. 156, 214 F.2d 254, and cases there cited. But *our power in this regard is to be exercised with caution and not when the error which necessitates a new trial is in respect of a matter which might well have affected the jury's determination of other issues.* Cf. Thompson v. Camp, 6 Cir., 167 F.2d 733. Here it appears from the record as a whole that the interests of justice will be best served by a new trial on all issues. * * *" 244 F.2d at 376. (Emphasis supplied).

Likewise, in *Lucas v. American Manufacturing Co.*, 630 F.2d 291 (5th Cir.1980) the court stated:

"Where, as here, the issues of liability and damages were tried together *and there are indications that the jury may have rendered a compromise verdict,* the Court should grant a new trial on all issues rather than one limited solely to the issues rather than one limited to solely the issue of damages." (At 294; Emphasis added).

Furthermore, in *Fury v. Shakespeare,* 554 F.2d 1376 (5th Cir.1977), the court stated:

> "We also have decided that a new trial is required on the issue of compensatory damages. Because this issue is so intimately intertwined with issues of liability . . . justice requires that a new trial be held on all issues."

The Second Circuit has also stated the governing rule in a similar manner, requiring a new trial on all matters if there was a *reasonable possibility* of a compromise verdict. *Ajax Hardware v. Industrial Plants Corp.*, 569 F.2d 181 (2d Cir.1977).

The prevailing rule, as initially stated by this Court and applied by various Circuit Courts is that a new trial on the issues of *both* liability and the amount of damages should be granted if the apparent error "could have" or "might well have" influenced other findings or where "there are indications" of a compromise verdict. The thrust of the prevailing rule is significant. It is that where a compromise is *possible* ("could have," "might well have influenced," or "indication") a new trial should encompass all issues which could have possibly been affected by the error which is indicative of compromise.

The Eleventh Circuit has completely reversed the existing rule. The possibility or indication of compromise is no longer the basis for a new trial on the related issues of both liability and damages. The new test moves in the opposite direction. The court looked for, not an indication of possible error affecting the entire decision, but for a possible explanation of the jury's conduct, stating in part:

> "It is possible that the jury thought BKC would receive payment on the promissory notes and accounts based solely on their finding that BKC was entitled to recover for these items and, therefore, any ad-

ditional findings of 'damages' would simply amount to a duplication."

The thrust of the new rule is that where a possible explanation can be provided, only a partial new trial should be granted.* This is the direct opposite of the prevailing rule which said that if there was *any* indication of compromise, a complete new trial should be granted. Mere speculation as to possible explanations was not sufficient to deny a total new trial in the face of indications of conduct affecting the entire decision.

The *possibility* of compromise no longer governs, and "indications" of compromise are no longer significant; and the fact that the error (a clearly inappropriate damage award) "might have" or "could have affected other issues" is now subservient to speculation based upon "the totality of the circumstances." The court attributed this test to *Williams v. Slade, supra.* Such language does appear in *Williams* at page 609. However, it is clear that when one reads the pertinent portion of the decision, it is simply an explanatory passage, perhaps not as clear as one would desire, which does not alter the test set forth on lines 30-35, at page 608, quoted above. In other words, the court can examine the totality of circumstances *to determine* whether the error *could* have influenced the verdict. A general examination of the totality of circumstances *in order to search for any possible explanation* is not the appropriate test. Restated, a court may properly examine the totality of the circumstances, but toward what end?

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*The appellate panel cited only *Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242 (5th Cir.1980) in support of its holding. In *Hadra* the Court stated that the issue excluded from the new trial was logically *independent of the alleged source of compromise and the appellant conceded* that there was no likelihood of jury misconduct.

The prevailing rule directed the examination toward discovering any indication that the error affected other issues such as liability, thereby mandating a complete new trial. The new rule directs an examination toward discovering any possible explanation which will then serve as a basis for denial of a complete new trial.

This shift in emphasis is not a mere question of degree. Rather, it directly reverses the old rule, creates conflict with the decisions quoted above, and creates considerable confusion for any trial judge faced with this question.

II.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THIS COURT'S DECISION IN *ATLANTIC AND GULF STEVEDORES, INC. v. ELLERMAN LINES*, 369 U.S. 355 (1962) OR A SUBSTANTIAL DEPARTURE FROM THE LAW SET FORTH THEREIN INSOFAR AS THE TRIAL JUDGE FAILED TO SEEK A RESOLUTION OF THE JURY'S ANSWERS WHICH WOULD MAKE THEM CONSISTENT.

Another issue decided adversely to MASON by the appellate panel was whether the trial judge could have reconciled the jury's findings that "NONE" of the MASON franchises were properly terminated with an apparent finding that some were improperly terminated.

The pertinent special issue was constructed as follows:

SPECIAL ISSUE NO. 5

With respect to BURGER KING CORPORATION's claims regarding termination of the franchise agreements, we the jury find that:

A. BURGER KING CORPORATION properly terminated all of the franchise agreements.

or

B. BURGER KING CORPORATION wrongfully terminated all of the franchise agreements,

or

C. BURGER KING CORPORATION properly terminated the franchise agreements covering the restaurants listed in Column 1 and wrongfully terminated the franchise agreements covering the restaurants listed in Column 2.

The jury did not check categories A or B. Rather, it turned to category C which had a column for franchises properly terminated and a column for franchises wrongfully terminated. There was a great deal of listing in each column and subsequent crossing out. (The jury's work product is contained in the Appendix). Ultimately, after much crossing out, under the column designating proper termination, the jury wrote in the word "None". However, the jury had apparently not completed the process of crossing out specific numbers under the contrary column.

The Eleventh Circuit disregarded the basic rule of law which governs this type of situation; namely, this Court's pronouncement in *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 (1962):

> *"Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment."* (At 364; Emphasis supplied).

This principle has been explicitly incorporated in *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103 (5th Cir. 1975).

There is a view of the case which explains the apparent inconsistency, and discounts the reasoning of the Eleventh Circuit. It is readily apparent that the jurors initially rejected alternatives A and B (all yes or all no). Turning to C, they began to enter various franchise numbers under two columns designating proper termination or wrongful termination. Subsequently, they did much crossing out. Then *they entered the word "None"* under the column for proper termination. At that point, they decided that their position was clear and their work was finished and left the answers in their existing form.

The Eleventh Circuit overlooked an extremely probable scenario and failed to apply the governing rule, namely that when reconciliation of special interrogatories is possible, the court should do so in order to preserve the right provided by the Seventh Amendment. Therefore, the ruling below constitutes a substantial departure from the law which conflicts with a previous decision of this Court.

CONCLUSION

Wherefore, based upon the foregoing, this Court should issue a writ of certiorari.

Respectfully submitted,

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By J. ROBERT OLIAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to ANDREW C. HALL, ESQ., Hall and O'Brien, P.A., Brickell Concours, #200, 1401 Brickell Avenue, Miami, Florida 33131; and LEE N. ABRAMS, ESQ., Mayer, Brown & Platt, Co-Counsel for Respondent, 231 S. LaSalle St., Chicago, Illinois 60604, this 29th day of December, 1983.

J. ROBERT OLIAN

APPENDIX

DECISION OF ELEVENTH CIRCUIT COURT OF APPEALS

(Dated August 1, 1983)

BURGER KING CORPORATION,
Plaintiff-Appellee, Cross-Appellant,

v.

Gerald A. MASON, et al.,
Defendants-Appellants, Cross-Appellees.

BURGER KING CORPORATION, a Florida Corporation,
Plaintiff-Appellee, Counter-Defendant, Cross-Appellant,

v.

Gerald A. MASON, et al.,
Defendants-Appellants, Counter-Plaintiffs,
Cross-Appellees.

Nos. 82-5066, 82,5803.

United States Court of Appeals, Eleventh Circuit.

Aug. 1, 1983.

Franchisor sued franchisee upon various claims, and the franchisee sought on appeal to reverse portions of the final judgment of the United States District Court for the Southern District of Florida at Miami, Edward B. Davis, J. The franchisor filed cross appeals to certain adverse rulings. Franchisee also filed separate appeal from attorney's fee award and franchisor cross appealed on such issue. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that: (1) compromise verdict was not indicated and district court did not abuse discretion in or-

dering new trial only on issue of damages; (2) where jury's choice of one alternative was inconsistent with its finding that no franchise had been properly terminated and jury's answer did not resolve disposition of over half of the franchises, trial court properly declined to supply facts submitted for jury's determination but left unanswered; (3) instruction to jury that franchise could not be revoked absent a "material" breach of the particular agreement comported with substantial Florida case law; (4) where franchisor consented to use of trademark provided that franchisor retained its right to seek damages upon later determination of its right to cancel any or all of remaining franchises, trial court could find that franchisee "ratified" such proposal and therefore was estopped from claiming that franchisor had agreed to trademark use; (5) continued trademark use by one whose trademark license had been cancelled satisfied likelihood of confusion test and constituted trademark infringement; but (6) record failed to support finding that profits earned by franchisee equaled franchisor's damages from breach by franchisee, and thus award of profits as compensatory damages for breach of contract was error.

Attorney's fees award made pursuant to Florida statute vacated, and damages assessed for breach of franchise agreements vacated; case remanded with directions; judgment otherwise affirmed.

1. Jury (Key) 31(7½)

Partial new trial may not be granted if it would infringe upon litigant's Seventh Amendment right to jury trial, and it must clearly appear that issue to be retried is so distinct and separable from others that trial of it alone may be had without injustice. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

2. Federal Civil Procedure (Key) 2315

If there is compromised finding on liability, separate trial on damages alone will not suffice, and both liability and damages must be relitigated in new trial. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

3. Federal Civil Procedure (Key) 2194

Nominal or inadequate finding of damages by itself does not automatically mandate conclusion that award was product of compromise verdict and, rather, inquiry must concentrate on any indicia of compromise apparent from the record and other factors which may have caused jury to return verdict for inadequate damages. Fed.Rules Civ. Proc.Rule 59(a), 28 U.S.C.A.

4. Federal Civil Procedure (Key) 2315

Only if "totality of the circumstances" indicates that issue sought to be excluded by partial new trial is not separable from error in damage award will plenary new trial be authorized. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

5. Federal Civil Procedure (Key) 2315

Where jury repeatedly found that defendant failed to establish its affirmative defenses, which was only basis on which defendant could escape liability, and where sole indication of jury compromise was low amount of damages and jury required only two to three hours to reach verdict after long, protracted trial, and where award could only be explained by reference to use of term "damages" on special interrogatories, compromise verdict was not indicated and district court did not abuse discretion in ordering new trial only on issue of damages. Fed.Rules Civ.Proc. Rule 59(a), 28 U.S.C.A.

6. Federal Courts (Key) 825

Even though more stringent appellate review is called for when trial court orders new trial, abuse of discretion standard controls appellate consideration of the decision. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

7. Federal Civil Procedure (Key) 2197

Trial judge must make all reasonable efforts to reconcile inconsistent jury verdict, and if there is view of case which makes jury's answers consistent, court must adopt that view and enter judgment accordingly.

8. Federal Civil Procedure (Key) 2192

Test employed in determining whether conflict in verdict can be reconciled is whether answers may fairly be said to represent logical and probable decision on relevant issues as submitted, but if jury's answers are so ambiguous or conflicting that they cannot be reconciled fairly, trial court may not enter judgment thereon.

9. Federal Civil Procedure (Key) 2237

Special verdict which does not resolve essential facts or which does so in inexplicable fashion will not support judgment, and trial judges are not empowered to fill in facts omitted from answer to special interrogatory.

10. Federal Civil Procedure (Key) 2240

When insurmountable inconsistency or ambiguity in jury verdict is perceived, trial court may resubmit issue to jury before it is dismissed, or order new trial on some or all of the issues. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 2216

Because of risk of inconsistency and ambiguity which accompanies use of special interrogatories, attorneys should pay careful attention insuring that acceptable verdict has been rendered before jury is discharged from case.

12. Federal Civil Procedure (Key) 2240

In suit arising out of franchise operation, wherein jury's choice of one alternative was inconsistent with its finding that no franchise had been properly terminated and jury's answer did not resolve disposition of over half of the franchises, trial court properly declined to supply facts submitted for jury's determination but left unanswered. Fed.Rules Civ.Proc.Rule 59(a), 28 U.S.C.A.

13. Contracts (Key) 261(1), 321(2)

Mere breach of agreement which causes no loss will not sustain suit for damages, much less rescission.

14. Contracts (Key) 261(2)

Although as general rule parties to contract may strictly enforce its terms and courts will not rewrite agreement to undo consequences of bad bargain, unilateral termination of contracts is not blindly sanctioned when default causes no harm to party seeking to avoid performance.

15. Contracts (Key) 353(7)

Instruction to jury that franchise could not be revoked absent a "material" breach of the particular agreement comported with substantial Florida case law.

16. Federal Courts (Key) 781

Given possible ambiguity in state judicial precedent, Court of Appeals deferred to district judge's interpretation of law of state in which he presided.

17. Trade Regulation (Key) 540

Ordinarily, trademark infringement cases are predicated on complaint that defendant employed trademark so similar to that of plaintiff that public will mistake defendant's products for those of the plaintiff. Lanham Trade-Mark Act, § 32(1)(a), 15 U.S.C.A. § 1114(1)(a).

18. Trade Regulation (Key) 334

Falsely suggesting affiliation with trademark owner in manner likely to cause confusion as to source or sponsorship constitutes infringement. Lanham Trade-Mark Act, § 32(1)(a), 15 U.S.C.A. § 1114(1)(a).

19. Trade Regulation (Key) 338

Unauthorized use of trademark which has effect of misleading public to believe that user is sponsored or approved by registrant can constitute infringement. Lanham Trade-Mark Act, § 32(1)(a), 15 U.S.C.A. § 1114(1)(a).

20. Trade Regulation (Key) 112

Where trademark registrant consented to use of trademark provided that registrant retained its right to seek damages upon later determination of its right to cancel any or all of remaining franchises, trial court could find that franchisee "ratified" such proposal and therefore was estopped from claiming that registrant had agreed to trademark use. Lanham Trade-Mark Act, § 32(1)(a), 15 U.S.C.A. § 1114(1)(a).

21. Trade Regulation (Key) 338

Continued trademark use by one whose trademark license had been cancelled satisfied likelihood of confusion test and constituted trademark infringement. Lanham Trade-Mark Act, §§ 1 et seq., 32(1)(a), 35, 15 U.S.C.A. §§ 1051 et seq., 1114(1)(a), 1117.

22. Trade Regulation (Key) 598

Trial court could find that franchisor did not prove with sufficient certainty that continued operation after termination of franchise caused purported injury.

23. Damages (Key) 6

Wrongdoer cannot escape liability simply because harm he caused is difficult to value, but plaintiff must make positive showing that defendant was in fact responsible for the alleged damages.

24. Damages (Key) 28

Award of infringer's profits can be appropriate measure of damages for federal or state trademark infringement but disgorgement of profits earned is not remedy for breach of contract and, under Florida law, contract plaintiff may recover damages in amount which will place him in position that he would have obtained but for the breach or the damages that are the natural and proximate result of the default, subject to the rules of foreseeability and certainty.

25. Damages (Key) 189

Record failed to support finding that profits earned by franchisee equaled franchisor's damage from breach by franchisee, and thus award of profits as compensatory damages for breach of contract was error.

26. Damages (Key) 40(1)

Accounting of profits may be appropriate to prevent unjust enrichment of trademark infringer, but does not compart with compensatory nature of breach of contract damages.

27. Trade Regulation (Key) 672, 683

Damages provision of Lanham Act vests considerable discretion in district court, and, guided by principles of equity, court may award defendant's profits, and additional extraordinary relief such as treble damages and attorney's fees are available under statute if district court believes that such assessment would be just. Lanham Trade-Mark Act, § 35, 15 U.S.C.A. § 1117.

28. Trade Regulation (Key) 725

Remedial accommodation provided by damages provision of Lanham Act envisions exercise of trial judge's discretion, and it would be inappropriate for reviewing court to attempt determination of damages in first instance. Lanham Trade-Mark Act, § 35, 15 U.S.C.A. § 1117.

29. Trade Regulation (Key) 682

Award of attorney's fees for violation of Lanham Act is proper only in "exceptional cases" and the elements of bad faith or fraud must be present to support the same. Lanham Trade-Mark Act, § 35, 15 U.S.C.A. § 1117.

30. Trade Regulation (Key) 683

There is no automatic right to enhance damages for Lanham Act violation. Lanham Trade-Mart Act, § 35, 15 U.S.C.A. § 1117.

31. Trade Regulation (Key) 673

Although accounting of profits can be effective means to prevent unjust enrichment of trademark infringer, all monetary awards under damages provision of Lanham Act are subject to principles of equity. Lanham Trade-Mark Act, § 35, 15 U.S.C.A. § 1117.

32. Federal Civil Procedure (Key) 2737.5

Where it was provided in development agreements that in the event developers disputed franchisor's termination of agreement and legal action was commenced developers would indemnify and reimburse franchisor for costs and attorney's fees in successfully "defending such action," term "action" near end of provision meant legal action as opposed to "action" of terminating agreements in general, but where in response to franchisor's general complaint developers contended that development agreements had been illegally cancelled and filed counterclaim for specific performance and damages for wrongful termination, franchisor was placed in position of defending lawsuit for wrongful termination of development agreements, and situation was squarely within terms of attorney's fee provision.

33. Costs (Key) 10

Under Florida law, contract which provides for payment of attorney's fees is binding and must be enforced by trial court.

34. Federal Civil Procedure (Key) 2737.5

In view of overlapping of issues, some of which were compensable and some of which were not compensable under contract provision for payment of attorney's fees,

and in view of district court judge's opportunity to estimate amount of lawyer time devoted to various issues before him, fee awarded to franchisor pursuant to development agreements satisfied reasonableness standard.

35. Costs (Key) 173(1)

Under Florida statute providing for reasonable attorney's fee award to prevailing party, there must be finding by the court that there was complete absence of justiciable issue raised by losing party, and same was true even where it was obvious to reviewing court that, by awarding fees pursuant to the statute, the trial judge found that claims met statutory standard. West's F.S.A. § 57.105.

36. Costs (Key) 173(1)

Attorney's fees can be granted under Florida statute when claims have been dismissed or defeated as long as no justiciable issues of law or fact were raised by the claims, and although dismissal by itself will not support award, voluntary dismissal is not bar to award of attorney's fees under the statute. West's F.S.A. § 57.105.

37. Costs (Key) 173(1)

Notwithstanding Florida statute providing for award of reasonable attorney's fee to prevailing party in any civil action in which court finds that there was complete absence of justiciable issue raised by losing party, there is no Florida authority to justify, much less mandate, award for services of house counsel as part of attorney's fees. West's F.S.A. § 57.105.

38. Costs (Key) 10

Under Florida law, contract provision which specifies that attorney's fees must be paid in event of litigation

is enforceable as agreement for indemnification, and where franchisor did not have to pay out additional money for services of its house counsel, it could not claim "reimbursement" for prorata share of fixed corporate expense. West's F.S.A. § 57.105.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

Following approximately five years of litigation in the United States District Court for the Southern District of Florida encompassing two jury trials, one bench trial and countless motions and hearings, the appellants, a group of investors including Gerald Mason, Wesley Hardy, Donald Szabo and Richard Peterson (hereinafter collectively referred to as "Mason") by this appeal, seek to reverse portions of the final judgment. The Burger King Corporation ("BKC"), the original plaintiff in the action, filed a cross-appeal to certain adverse rulings of the district court. Mason also filed a separate appeal from the attorney's fee award and BKC again cross-appealed on this issue. After an exhaustive review of the evidence and each assignment of error, we affirm in part and remand in part for further proceedings.

I. Introduction

BKC, one of the largest franchisors of fast-food restaurants in the United States, maintained a business relationship with Mason for many years. As a result of this relationship, Mason acquired the right to establish Burger King restaurants in two major metropolitan areas and to

develop other restaurants throughout the United States during the 1970's. Mason's territorial rights derived from two development agreements between the parties by which Mason obtained the exclusive authority to establish Burger King franchises in Pittsburg and Kansas City. Over the years Mason purchased at least twenty-seven Burger King franchises under separate agreements. In connection with the development of some of the franchises, BKC provided financing to Mason for which Mason executed promissory notes. Mason incurred additional obligations for payments due under certain lease agreements with BKC, for supplies furnished on account and for royalties due under the franchise agreements. (The leases, accounts for supplies and royalties will be referred to as the "accounts".)

The long standing Mason-BKC business association began to deteriorate in 1977 when BKC notified Mason of the cancellation of the two exclusive development agreements. In 1978, BKC filed this suit seeking a declaration that it had properly terminated the development contracts. Mason responded with a counterclaim for reinstatement and damages for the revocation. Afterwards, in 1979, BKC informed Mason that it was unilaterally terminating all twenty-seven of its Burger King franchises for failure to comply with the terms of the franchise agreements. Eventually, through amendments to the complaint and counterclaim, the suit filed in 1978 expanded to controversies concerning both the development and franchise agreements as well as demands arising from Mason's liability on the promissory notes and the accounts.

In 1980 the case came on for trial and the issues were submitted to the jury on special interrogatories. The jury found that the development contracts were validly cancelled but that BKC wrongfully terminated twelve of the franchise agreements. Because of the equivocal nature

of the jury's verdict as to the remaining fifteen franchise terminations, the district court ordered a new trial on those agreements. The court also granted a new trial to BKC for a computation of damages resulting from Mason's liability on the promissory notes and accounts. Since there was no genuine issue of fact as to the amount due on the promissory notes and accounts, the district court thereafter entered a summary judgment in favor of BKC for those damages. Before the second jury trial, BKC conceded its error in terminating one of the fifteen franchises left for trial. Also, during the second trial, the district court sustained, as a matter of law, the revocation of seven of the franchises. Thus, by concession or court order, eight of these fifteen terminations were eliminated from the jury's consideration. After the second trial in 1981, the jury found that BKC validly terminated six of the remaining franchises. Consequently, Mason prevailed in its efforts to nullify the terminations of fourteen of its franchises and BKC successfully defended the cancellation of thirteen franchise agreements.

Subsequent to the second jury trial, the district court held a bench trial on BKC's claims for common law trademark infringement, unfair competition and breach of the franchise agreements based upon Mason's post-termination use of the Burger King trademarks. The court awarded to BKC the profits earned from the franchises previously found to have been lawfully terminated for the breach of the franchise agreements.

Finally, the district court conducted a hearing on BKC's application for attorney's fees. The court awarded fees in accordance with the provisions of the development agreements, the notes, the leases and a Florida statute.

II. The 1980 Jury Verdict

In attacking the trial judge's resolution of the 1980 jury verdict, Mason challenges the grant of a new trial limited to the issue of BKC's damages on the promissory notes and the accounts. Second, Mason asserts that the district court also erred in ordering a new trial for a determination of the validity of BKC's cancellation of the franchises not listed on the jury's verdict form.

A. Did the jury compromise?

In its answer to Special Issue # 1, the jury found in favor of BKC on the promissory notes (valued at approximately $1,000,000.00), rejecting Mason's affirmative defenses thereto.[1] However, it awarded BKC only $1.00 as damages. Responding to Issue # 2, the jury sustained BKC's right to recover on the accounts (valued at approximately $500,000.00) and found against the affirmative defenses. BKC was awarded $100,000.00 as "damages" for this item

Neither party brought these inconsistent results to the district court's attention until after the jury had been discharged and it was too late to resubmit the damages question to the jury. BKC eventually filed a motion for a clarification of the jury verdict on the promissory notes and the accounts. By this motion, BKC sought a judgment for the face amount of the debts, as shown by the evidence, plus the "damages" awarded by the jury. Alternatively, BKC moved for a judgment notwithstanding the verdict

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1. As affirmative defenses to liability on the notes and the accounts, Mason claimed that (1) BKC was guilty of economic coercion; (2) BKC fraudulently induced Mason to incur the liabilities; and (3) Mason was entitled to a set-off for the full amount of the obligations because BKC wrongfully terminated the development agreements. These contentions were also the subject of Mason's counterclaim.

for the full amount of the obligations. The district court denied both motions and, instead, ordered a new trial limited to a computation of BKC's damages on the promissory notes and the accounts. Subsequent to this order, BKC filed a motion for summary judgment supported by affidavits establishing its entitlement to the full amount of the debts. Since Mason submitted no evidence in opposition to the affidavits, the district court granted judgment to BKC for these liquidated amounts.

Mason contends that the jury's inadequate award of damages signifies an improper compromise verdict because three was no dispute as to the correct amount due on the notes and accounts. Mason therefore claims that the liability and damages issues were inseparable and the trial judge erred in restricting a new trial to the question of damages.

Rule 59(a) of the Federal Rules of Civil Procedure provides that a new trial may be granted "on all or part of the issues." The decision whether to grant a new trial is discretionary with the district court and will not be reversed absent an abuse of that discretion. *See, e.g., Franks v. Associated Air Center, Inc.*, 663 F.2d 583, 586 (5th Cir. 1981); *Lucas v. American Manufacturing Co.*, 630 F.2d 291 (5th Cir.1980);[2] *Young v. International Paper Co.*, 322 F.2d 820, 822 (4th Cir.1963).

[1, 2] It is axiomatic, however, that a partial new trial may not be granted if it would infringe upon a litigant's seventh amendment right to a jury trial. In *Gasoline Products v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1930), the Supreme Court enunciated the standard which governs partial new trial practice:

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2. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit Court of Appeals adopted as precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

> [w]here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

Id. at 500, 51 S.Ct. at 515, 75 L.Ed. at 1191. Applying *Champlin Refining*, the former Fifth Circuit Court of Appeals held that a jury verdict influenced by an improper compromise cannot stand and a complete new trial is required because liability and damages are inseparable. *See, e.g., Lucas v. American Manufacturing Co.*, 630 F.2d 291, 294 (5th Cir.1980); *Hatfield v. Seaboard Air Line R.R. Co.*, 396 F.2d 721, 724 (5th Cir.1968). Hence, if there is a compromised finding on liability, a separable trial on damages alone will not suffice—both liability and damages must be relitigated in a new trial. *Id.*

[3, 4] With this admonition in mind, we focus our attention on whether the district court abused its discretion in rejecting the compromise claim. "A compromise verdict is one where it is obvious that the jury compromised the issue of liability by awarding inadequate damages." *Freight Terminals Inc. v. Ryder System, Inc.*, 461 F.2d 1046, 1053 (5th Cir.1972). However, a review of the cases from the former Fifth Circuit Court of Appeals establishes that a nominal or inadequate finding of damages by itself does not automatically mandate the conclusion that the award was the product of a compromise verdict. *See, e.g., Hadra v. Herman Blum Consulting Engineers*, 632 F.2d 1242, 1247 (5th Cir.1980), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981); *Davis v. Becker & Associates, Inc.*, 608 F.2d 621 (5th Cir.1979); *Bassett Furniture Industries of North Carolina, Inc. v. NVF Co.*, 576 F.2d 1084, 1094 (5th Cir.), *reh. denied with opinion*, 583 F.2d 778 (5th Cir.1978); *Parker v. Wideman*, 380 F.2d 433, 437 (5th Cir.1967). In-

deed, if inadequate damages was the sole test for a compromise, Rule 59(a) would have little or no purpose. Rather, our inquiry must concentrate on any indicia of compromise apparent from the record, *Hatfield*, 396 F.2d 721, 723-24, and other factors which may have caused the jury to return a verdict for inadequate damages. *See Hadra*, 632 F.2d 1242, 1244 n. 1. Only if the "totality of the circumstances" indicates that the issue sought to be excluded by a partial new trial is not separable from the error in the damage award, will a plenary new trial be authorized. *See Williams v. Slade*, 431 F.2d 605, 609 (5th Cir.1970).

Two former Fifth Circuit cases offer instructive examples of situations where the record contained adequate indications of compromise to warrant a complete new trial. In *Hatfield*, the court held that a jury verdict finding liability and awarding $1.00 in damages was the result of a compromise. The court found that under all the circumstances, including the jury's confusion concerning contributory negligence and the fact that it took two days to return a verdict, there was strong support for the conclusion that the inadequate award of damages was the culmination of a compromise among the jurors. The former Fifth Circuit again determined that the jury probably compromised in *Lucas v. American Manufacturing Co.*, 630 F.2d 291 (5th Cir.1980). In *Lucas*, the trial judge admonished the jury to return a verdict quickly because a hurricane was approaching the city. The jury did so, but after finding the defendant liable, awarded the plaintiff patently inadequate damages. On appeal, the Fifth Circuit remanded for a new trial on liability and damages. The court reasoned that in their haste to decide the case before the arrival of the hurricane, the jurors probably compromised, agreeing to find liability only if the damages were kept to a minimum.

By contrast, the court has rejected the compromise theory when the record discloses another basis for the improper award. For example, in *Hadra v. Herman Blum Consulting Engineers,* 632 F.2d 1242 (5th Cir.1980), *cert. denied,* 451 U.S. 912, 101 S.Ct. 1983, 68 L.Ed.2d 301 (1981), the jury found that the defendant had breached the plaintiff's employment contract but awarded no damages. The district court ordered a new trial confined to the plaintiffs' claim of damages for the breach. The Fifth Circuit affirmed the grant of a partial new trial. The court rejected the defendant's contention that the jury verdict was the product of a compromise, thereby affirming the district court's explanation that the failure to afford monetary relief could have resulted from an improper determination that the plaintiff failed to mitigate his damages by accepting alternative employment. *See* 632 F.2d at 1244, n. 1. In *Hadra,* the court emphasized that the defendant pointed to "no circumstances, such as those listed in *Hatfield,* that indicate the possibility of a compromise verdict . . .". *Id.* at 1246. Consequently, since there was sufficient evidence to support the jury's finding of liability, the court held that it was proper to order a new trial limited to damages.

[5] The record before us confirms our belief that the liability and damages issues were also separable in this instance. First, and foremost, the jury repeatedly found that Mason failed to establish its affirmative defenses, the only basis upon which Mason could escape liability. It did so in finding against Mason on the promissory notes and accounts; it rejected the affirmative defenses again when they were asserted as grounds for setting aside the terminations of the development agreements; and once more when they constituted the foundation for the counterclaim against BKC. We can come

to no other conclusion than that the jury did not believe Mason's allegations of economic coercion, fraudulent inducement or wrongful termination of the development agreements. Having clearly convinced the jury that these claims lacked merit, BKC should not have to defend against them again. Second, the record contains absolutely no indicia of a compromise other than the low amount of damages. After a long, protracted trial, the jury required only two to three hours to reach its verdict. It obviously was not deadlocked. The jury did not request additional instructions or attempt to qualify its verdict in any manner. Finally, as BKC points out, the award could be explained by reference to the use of the term "damages" on the special interrogatories. It is possible that the jury thought that BKC would receive payment on the promissory notes and accounts based solely on their finding that BKC was entitled to recover for these items and, therefore, any additional finding of "damages" would simply amount to a duplication.[3] The "totality of the circumstances" simply do not point to a compromise verdict. Viewed in this factual and procedural setting, the district court did not abuse its discretion in ordering the partial new trial.

B. Franchise Termination Verdict Form

Special Issue # 5 sought a determination of the validity of BKC's terminations of Mason's franchise agreements. The jury could find: (a) BKC properly terminated all of the agreements; (b) BKC wrongfully terminated all of the agreements; or (c) BKC properly terminated the

3. BKC offered alternative verdict forms which asked the jury to designate the amount of Mason's "liability" on the various obligations. The term "liability" would have more accurately reflected the nature of the recovery. Thus, although the proffer was rejected, BKC did attempt to avoid the potentially confusing reference to "damages".

franchises listed in column one and wrongfully terminated the franchises listed in column two. The jury circled alternative (c), but after designating some franchise numbers under the properly terminated column, crossed them out and wrote "none". The jury specified only twelve of the twenty-seven franchise agreements at issue in the wrongfully terminated column.[4]

Again, neither party requested that the issue be resubmitted to the jury for clarification. As a result, the jury was discharged without the opportunity to correct these inconsistencies, leaving the district court with the difficult task of interpreting the verdict. In a post trial motion, BKC sought a judgment notwithstanding the verdict, claiming that the evidence established that all of the franchises had been properly cancelled. Alternatively, BKC asked for a new trial on all of the franchise terminations. As expected, Mason took the opposite position, asserting that the verdict correctly found that all of the franchises were wrongfully terminated. The district court rejected all of those contentions, instead ordering a new trial for the restaurants which were not listed in either column. In its order, the court stated that "[i]t [was] very uncertain . . . whether [the jury] made any determination as to the other restaurants [not listed] . . . [and] it would not serve the best interests of justice for the court to attempt to read the jury's mind in an effort to resolve this ambiguity." R. 3136.

Mason faults the trial court for its failure to construe these responses as a finding that all of the franchises had been wrongfully terminated. Emphasizing the district court's duty to attempt to reconcile inconsistent special verdicts, Mason claims that the district court was

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4. The jury's answer to Special Issue # 5 is reproduced as an appendix to this opinion.

required to so conclude because the jury's answer that "none" were properly cancelled obviously indicates that the jury decided that all twenty-seven terminations were without legal cause. Mason makes this argument in spite of the fact that the jury did not select that alternative on the verdict form and only identified twelve franchises in that category.

[6] As stated before, the district court has authority under Rule 59(a) of the Federal Rules of Civil Procedure to order a partial new trial. Even though more stringent appellate review is called for when the trial court orders a new trial, the abuse of discretion standard still controls our consideration of the decision. *See, e.g., Williams v. City of Valdosta*, 689 F.2d 964, 974 (11th Cir.1982); *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053 (11th Cir.1982).

[7-11] A trial judge must make all reasonable efforts to reconcile an inconsistent jury verdict and "if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir.1973). *See, e.g., Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798, 806-807 (1962); *Aquachem Company, Inc. v. Olin Corp.*, 699 F.2d 516, 521 (11th Cir.1983); *Miller v. Royal Netherlands Steamship Co.*, 508 F.2d 1103, 1106 (5th Cir.1975). The test employed in determining whether a conflict in the verdict can be reconciled is "whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted . . .". *Griffin*, 471 F.2d at 915. However, if the jury's answers are so ambiguous or conflicting that they cannot be reconciled fairly, the trial court may not enter judgment thereon. *Royal Netherlands Steamship Co. v. Strachan Shipping Co.*, 362 F.2d 691, 694 (5th Cir.1966), *cert.*

denied, 385 U.S. 1004, 87 S.Ct. 708, 17 L.Ed.2d 543 (1967). A special verdict which does not resolve the essential facts, or does so in an inexplicable fashion, will not support a judgment. *Prentice v. Zane's Administrator*, 49 U.S. (8 HOW.) 470, 484, 12 L.Ed. 1160, 1166 (1850); *Hartnett v. Brown & Bigelow*, 394 F.2d 438, 441, n. 2 (10th Cir.1968). Moreover, trial judges are not empowered to fill in facts omitted from the answer to a special interrogatory. *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402 (5th Cir.), *reh. denied with opinion*, 604 F.2d 320, 321 (5th Cir.1979). When an insurmountable inconsistency or ambiguity is perceived, the trial court may resubmit the issue to the jury before it is dismissed or order a new trial on some or all of the issues. *Nordmann v. National Hotel Co.*, 425 F.2d 1103, 1106 (5th Cir.1970).[5]

[12] Without doubt, the response to special issue # 5 was both inconsistent and ambiguous. If the jury intended to find that all of the franchises had been wrongfully terminated, it could have selected alternative (b) —it did not. Thus, the choice of alternative (c) was inconsistent with its answer that none of the franchises had been properly terminated. More significantly, the answer does not resolve the disposition of over half of

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5. Because of the risk of inconsistency and ambiguity which accompanies the use of special interrogatories, attorneys should pay careful attention to insuring that an acceptable verdict has been rendered before the jury is discharged from the case. *Guidry*, 598 F.2d at 405-06. Often the need for a new trial can be avoided by requesting resubmission to the jury. This procedure undoubtedly would have remedied the problem created by the answer to special issue # 5, since the jury could have completed its answer upon resubmission. A very cursory reading of the verdict form would have uncovered the inadequacies of the verdict. Had the attorneys examined the verdict with the same degree of vigor with which they pursued their cause at the trial and their assignments of error on appeal, valuable judicial resources could have been conserved.

the franchises. As the district court observed, it is not clear what the jury found, if anything, with respect to the omitted franchises. The trial court properly declined to supply facts submitted for the jury's determination but left unanswered. *Guidry*, 598 F.2d 402. Inconsistent or ambiguous verdicts must be reconciled only if that can be accomplished from a *fair* reading of the verdict. *Griffin*, 471 F.2d at 915. Faced with this incompatible answer, we have no criticism of the district court's exercise of its discretion in this instance.

III. Material Breach Instruction

In its cross-appeal, BKC challenges the finding that some of the franchises were wrongfully terminated. The source of this complaint is the district court's instruction to the jury that a franchise could not be revoked absent a "material" breach of the particular agreement. This, BKC says, is an erroneous statement of Florida law. In essence, BKC urges that it was entitled to strictly enforce the termination provisions of the agreements without regard to the materiality of the alleged defaults.

[13, 14] Although the Florida courts have recognized that the terms of franchise agreements are enforceable, *North Dade Imported Motors, Inc. v. Brundage Motors, Inc.*, 221 So.2d 170, 177 (Fla.Dist.Ct.App.), "it is elementary that the mere breach of an agreement which causes no loss . . . will not sustain a suit . . . for damages, much less rescission." *Block v. City of West Palm Beach*, 112 F.2d 949, 952 (5th Cir.1940) (quoted in, *Westcap Government Securities, Inc. v. Homestead Air Force Base Federal Credit Union*, 697 F.2d 911, 913 (11th Cir.1983)). Pursuant to this rule, the Florida courts, and this court construing Florida law, have held that a party may not escape performance under a contract on the ground that

a tender was not made by the date specified in the contract. Rather, a party who tenders late may enforce the contract with due allowance for any damage caused by the tardiness. *See, e.g., Westcap Government Securities, Inc.*, 697 F.2d at 914; *Blaustein v. Weiss*, 409 So.2d 103 (Fla.Dist.Ct.App.1982); *Jackson v. Holmes*, 307 So.2d 470 (Fla.Dist.Ct.App.), *cert. denied*, 318 So.2d 404 (Fla.1975); *Larsen v. Miami Gardens Dev. Corp.*, 299 So.2d 50 (Fla. Dist.Ct.App.1974); *National Exhibition Co. v. Ball*, 139 So.2d 489 (Fla.Dist.Ct.App.1962). Indeed, a Florida court has refused to countenance unilateral cancellation in that context even when the contract stipulated that time was of the essence. *Jackson*, 307 So.2d at 471-472. Thus, although as a general rule parties to a contract may strictly enforce its terms and the courts will not rewrite an agreement to undo the consequences of a bad bargain, *see, e.g., Sapienza v. Bass*, 144 So.2d 520 (Fla.Dist.Ct.App. 1962), the Florida courts do not blindly sanction unilateral termination of contracts when a default causes no harm to the party seeking to avoid performance.

[15, 16] Consistent with this principle, the Florida courts have indicated that the materiality of a breach is relevant when a party seeks to terminate or rescind a contractual relationship. *See, e.g., Callins v. Abbatecola*, 412 So.2d 58 (Fla.Dist.Ct.App.1982) (when a party sought to terminate a real estate contract on the ground that the purchaser's check was returned for insufficient funds, the court stated that "the question involved here is . . . whether [the tender of a bad check] . . . constituted such a material breach . . . as to justify . . . termination . . .". *Id.* at 59); *Gittlin Companies, Inc. v. David & Dash, Inc.*, 390 So.2d 86 (Fla.Dist.Ct.App.1980) (rescission of distributorship contract was not justified when the defendant made direct sales in violation of the exclusive distribution

provision of the distributorship agreement because the breach was not material or substantial). In *Gittlin Companies*, 390 So.2d at 86, the Florida court cited *McAlpine v. Aamco Automatic Transmissions, Inc.*, 461 F.Supp. 1232 (E.D.Mich.1978), in support of its holding that an immaterial breach of a distributorship agreement did not excuse performance. The *McAlpine* opinion states the rule followed by the district court in this case:

> A material breach would allow the franchisees to terminate their Franchise Agreements and discontinue future performance. An immaterial breach would allow the franchisees to sue for any damage caused, but they would still be bound to continue performance under the contract.

461 F.Supp. at 1249.

We conclude that the district court's instruction comported with substantial Florida case law and reject BKC's argument to the contrary.[6]

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6. The decision in *Austin's Rack, Inc. v. Austin*, 396 So.2d 1161 (Fla.Dist.Ct.App.), *cert. denied*, 402 So.2d 607 (Fla.1981), does not compel a different result. That case held that an employer may terminate an employee if the employee commits an act specified as grounds for termination in the employment agreement. While the *Austin* case generally supports the proposition that parties to a contract may strictly enforce its termination provisions, even the *Austin* court indicated that the termination clause was reasonable. To the extent that *Austin* represents a contrary line of authority, we, nevertheless, find that the materiality instruction was not error. Given this possible ambiguity in the Florida authorities, we defer to the district judge's interpretation of the law of the state in which he presides. *See Alabama Electric Cooperative, Inc. v. First National Bank of Akron, Ohio*, 684 F.2d 789, 792 (11th Cir.1982); *Kaufman & Broad Home Systems, Inc. v. International Brotherhood of Firemen & Oilers*, 607 F.2d 1104, 1108 (5th Cir.1979).

IV. Post-Termination Trademark Use

A. Background

Each of the franchise agreements stipulates that upon termination of the franchise, the franchisee must discontinue use of the Burger King trademarks. Following the May 1979 unilateral cancellation of all 27 of Mason's franchises, Mason sought an injunction to prohibit BKC from interfering with the operation of its restaurants as Burger King franchises. At the August 1979 evidentiary hearing on this motion, BKC advised the court that it would maintain the status quo, e.g. it would not force Mason to cease operating under the Burger King name, pending a final resolution of the franchise dispute. However, BKC conditioned this offer on its right to later pursue relief for the post-termination operation. Although Mason made no explicit response to this proposal, no further mention was made of this issue and Mason limited its proof and arguments to other remedies. Thereafter, BKC provided supplies to and accepted royalties from the Mason franchises during the litigation.

BKC amended its complaint to add a cause of action under the Lanham Act, 15 U.S.C. § 1114(1)(a), for Mason's post-termination use of the Burger King trademarks. At the close of the 1980 jury trial, the district court granted Mason's motion for a directed verdict on the Lanham Act claim. After doing so, the district court permitted BKC to again amend its complaint to include claims for common law trademark infringement, unfair competition and breach of contract based upon Mason's use of the trademarks at any restaurants whose franchise revocations might be adjudicated valid in the second trial. Finally, following the second jury's finding that certain franchises had been legally terminated, the district court proceeded with a bench trial on BKC's common law trademark, un-

fair competition and breach of contract causes of action. The district court held that Mason breached the franchise provisions prohibiting use of the Burger King trademark after invalidation of the agreement. Concluding that Mason had been "unjustly enriched" by this breach, the district court awarded BKC the profits earned by Mason as a consequence of the post-termination operation of these franchises as "compensatory damages" for the violation. In this order, the court found that BKC did not consent to the post-termination use of the trademark.

B. Lanham Act Claim

By way of cross-appeal, BKC asserts that the district court erred in directing a verdict favorable to Mason during the first jury trial on its Lanham Act claim for post-termination trademark infringement.[7] BKC maintains that it established the essential elements of federal trademark infringement when it proved that Mason displayed the Burger King marks after its right to do so had been revoked. We agree.

[17-19] In order to prevail on a trademark infringement claim, the registrant must show that (1) its mark was used in commerce by the defendant without the registrant's consent and (2) the unauthorized use was likely to cause confusion, or to cause mistake or to deceive. 15 U.S.C. § 1114(1)(a). Ordinarily, trademark infringement cases are predicated on the complaint that the defendant employed a trademark so similar to that of the plaintiff that the public will mistake the defendant's prod-

7. Because the first jury did not specify any franchises under the "properly terminated" column, BKC's claim for post-termination trademark infringement at the properly terminated restaurants could not have provided any relief after the first trial. However, once some franchises were found to have been validly terminated, the issue of the correctness of the directed verdict on the Lanham Act cause of action was revived.

ucts for those of the plaintiff. *See, e.g., Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500 (5th Cir.1980). Also, it is well established that "falsely suggesting affiliation with the trademark owner in a manner likely to cause confusion as to source *or sponsorship* constitutes infringement." *Professional Golfers Ass'n of America v. Bankers Life & Casualty Co.*, 514 F.2d 665, 670 (5th Cir.1975) (emphasis supplied). *See also, Control Components, Inc. v. Valtek, Inc.*, 609 F.2d 763, 770 (5th Cir.), *cert. denied*, 449 U.S. 1022, 101 S.Ct. 589, 66 L.Ed.2d 484 (1980). Thus, a trademark infringement case need not just involve imitation of the registrant's mark. The unauthorized use of a trademark which has the effect of misleading the public to believe that the user is sponsored or approved by the registrant can constitute infringement. *Professional Golfers Ass'n*, 514 F.2d at 670. The Lanham Act cause of action was based on the theory that by using the Burger King trademarks after the trademark license had been cancelled, Mason falsely suggested that its restaurants were sponsored by and affiliated with BKC. Because this type of infringement is cognizable under the Lanham Act, we must examine BKC's proof in light of the requirements of the statute.

[20] Mason denies the use of BKC's trademark without consent because after the terminations, BKC provided supplies bearing the Burger King trademarks and accepted royalties from the Mason group. This point was stressed on several occasions in the district court. Mason advanced this argument for the frist time during the hearing on Mason's motion for a directed verdict on the Lanham Act claim. The trial judge granted the motion without stating his reasons. Mason had insisted that a directed verdict was mandated because (1) BKC consented to the use of the trademark and (2) BKC did not show likelihood of confusion. Subsequently, BKC amended its complaint to

allege common law trademark infringement, unfair competition and breach of contract arising from Mason's post-termination use of the trademarks. BKC and Mason stipulated that any relief for these claims would be determined by the district court in a bench trial following the second jury trial if any of the franchises were found to have been properly terminated. At the subsequent bench trial, Mason asserted that BKC could not recover for common law trademark infringement because BKC consented to Mason's continued use. The consent issue was finally resolved adversely to Mason by the district judge in his findings of fact rendered after the bench trial. The court found that rather than acquiescing in the infringement, BKC agreed at the August, 1979 hearing that it would allow Mason to continue operating restaurants under the Burger King banner, provided that it retained its right to seek damages upon a later determination of its right to cancel any or all of remaining franchises. The court found that Mason had "ratified" this proposal, and therefore, was estopped from claiming that BKC had agreed to the trademark use.

The trial court reasonably could infer that Mason acquiesced in BKC's offer to permit Mason to continue to operate its restaurants upon the condition that BKC retained its right to recover for post-termination trademark infringement. Mason did not object to this approach and acted in a manner consistent with acceptance until the close of the 1980 jury trial. From our review of the record, we cannot say that a finding of estoppel under these circumstances was clearly erroneous.

[21] Because Mason used the Burger King trademarks after the revocation of that right without BKC's consent, a trademark infringement claim was established so long as the trademarks were employed in a manner that was likely to cause confusion, to cause mistake or to de-

ceive. 15 U.S.C. § 1114(1)(a). Common sense compels the conclusion that a strong risk of consumer confusion arises when a terminated franchisee continues to use the former franchisor's trademarks. A patron of a restaurant adorned with the Burger King trademarks undoubtedly would believe that BKC endorses the operation of the restaurant. Consumers automatically would associate the trademark user with the registrant and assume that they are affiliated. Any shortcomings of the franchise therefore would be attributed to BKC. Because of this risk, many courts have held that continued trademark use by one whose trademark license has been canceled satisfies the likelihood of confusion test and constitutes trademark infringement. *See, e.g., United States Jaycees v. Philadelphia Jaycees*, 639 F.2d 134 (3d Cir.1981); *Professional Golfers Ass'n v. Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir.1975); *Prompt Electric Supply Co., Inc. v. Allen-Bradley Co.*, 492 F.Supp. 344, 349 (E.D.N.Y.1980); *National Board of YWCA v. YWCA of Charleston, S.C.*, 335 F.Supp. 615, 628-629 (D.S.C.1971). BKC proved that Mason employed the Burger King trademarks after its franchise agreements were properly cancelled. This use was without BKC's consent and was likely to cause confusion. Accordingly, we hold that the district court erred in directing a verdict against BKC on its Lanham Act complaint and remand for a determination of the appropriate relief in conformity with 15 U.S.C. § 1117.[8]

C. Damages for Breach of the Franchise Agreements

[22, 23] As pointed out earlier, the district court concluded that Mason breached the provisions of the franchise agreements which prohibited the post-termination use of the Burger King trademarks. Although BKC also argued

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8. *See* Section IV D ("Lanham Act Damages") *infra*.

that Mason was guilty of common law trademark infringement and unfair competition through the continued use of the trademark, the district court made no findings on those claims. Then, after ruling that BKC had not shown certain consequential damages from the post-termination use of the trademarks, the court awarded BKC the profits that Mason earned at the properly terminated franchises as "compensatory damages" for the breach. BKC complains that the trial court should have allowed consequential damages; Mason, on the other hand, alleges that the trial court erred in ordering it to disgorge the profits.

BKC's assertions need not detain us long. It sought damages based on its contention that Mason's continued operation damaged its reputation and thwarted its plans to expand in the areas in which Mason franchises were located. After considering BKC's evidence in support of those damages, the district court determined that (1) BKC had not established that Mason had tarnished its image, and (2) BKC did not prove that Mason's failure to close its stores prevented BKC from carrying out its marketing or development plans. Contrary to BKC's suggestion, the district court did not deny damages because the amounts were uncertain—the court found that BKC did not prove that Mason's actions caused the claimed harm.

This factual finding was not clearly erroneous. A reading of the record confirms that BKC did not prove with sufficient certainty that Mason's continued operation caused the purported injury. While it is clear that a wrongdoer cannot escape liability simply because the harm he caused is difficult to value, *see, e.g., ABC-Paramount Records, Inc. v. Topps Record Distributing Co.*, 374 F.2d 455 (5th Cir.1967), it is equally well established that a plaintiff must make a positive showing that the defendant was in fact responsible for the alleged damages. *See, e.g.,*

Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301 So.2d 441, 445 (Fla.1974). BKC simply failed to meet its burden of proof.

The award of profits is more troublesome. Mason and BKC focus their arguments on the propriety of ordering an accounting of profits for trademark infringement. As the parties recognize, a trademark infringer can be required to turn over the profits he earns during the period of the infringement subject to the discretion of the district judge and in light of the equities of the case. 15 U.S.C. § 1117. *See, e.g., Maltina Corp. v. Cawy Bottling Co., Inc.*, 613 F.2d 582 (5th Cir.1980); *Mead Johnson & Co. v. Baby's Formula Service, Inc.*, 402 F.2d 19 (5th Cir.1968). However, the district court did not find that Mason infringed upon a trademark. Rather, faced with BKC's claims for trademark infringement, unfair competition and breach of the franchise agreements, the trial judge found only that Mason violated the franchise agreements. For that infraction, the court awarded Mason's profits as "compensatory damages."[9]

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9. While at first blush it might appear that the district court, in essence, found that Mason committed common law trademark infringement, a closer reading of the findings of fact and conclusions of law and the briefs filed in the district court, reveals that the court made no finding on the trademark or unfair competition claims. The three causes of action (trademark, unfair competition and breach of the franchise agreements) were pursued and defended against separately in the trial briefs. Mason's defense against the common law trademark intrusion was the same as that advanced at the hearing on the Lanham Act violation at the first trial. The district court's order unequivocally states that Mason "breached the contractual obligations imposed on them by the provisions in each of those franchise agreements which govern the post-termination conduct of the franchisees," and that "[b]y their continued wrongful operation of each of the thirteen restaurants . . . the Defendants have breached the franchise agreement relating to each restaurant." The opinion contains no reference to trademark "infringement" or the elements of a common law trademark infringement right of action. The district court's award of damages was based on the breach of the franchise agreements.

[24] Although an award of the infringer's profits can be an appropriate measure for damages for federal or state trademark infringement, *e.g., Maltina Corp.*, 613 F.2d at 584-585; 15 U.S.C. § 1117; Fla.Stat.Ann. §§ 495.131, 495.141 (West 1972), disgorgement of profits earned is not the remedy for breach of contract. Under Florida law, a contract plaintiff may recover damages in an amount which will place him in the position that he would have obtained but for the breach or the damages that are the natural and proximate result of the default, subject to the rules of foreseeability and certainty. 17 Fla.Jur.2d *Damages* § 26 (1980); *Juvenile Diabetes Research Foundation v. Rievman*, 370 So.2d (Fla.Dist.Ct.App.1979); *Popwell v. Abel*, 226 So.2d 418 (Fla.Dist.Ct.App.1969); *Olin's Inc. v. Avis Rental Car System of Florida, Inc.*, 172 So.2d 250 (Fla. Dist.Ct.App.), *cert. denied*, 177 So.2d 482 (Fla.1965). In some cases, if the offending conduct causes the non-breaching party to lose profits, the defendant can be required to compensate the plaintiff for the *lost profits*. *Sampley Enterprises, Inc. v. Laurilla*, 404 So.2d 841 (Fla.Dist.Ct. App.1981). Consequently, if BKC had demonstrated that Mason's refusal to cease operation after the terminations, as required by the franchise agreements, caused the injury to its reputation or the delay in development as it claimed, those damages could have been recovered as the natural and proximate result of the breach. But the district court found that Mason's breach did not cause that harm.

[25, 26] There is no support in the record that the profits earned by Mason equalled BKC's damages from the breach. That would be correct only if BKC proved that it would have taken over the operation of the franchises after termination and BKC reasonably could have earned the profits that were generated by Mason from such operation. Because BKC failed to show that it was

entitled to Mason's profits as compensation for the breach, the award of such profits as compensatory damages for breach of contract was error and must be vacated.[10]

D. Remand for Determination of Lanham Act Damages

We have concluded that Mason's post-termination use of the Burger King trademarks at those restaurants whose franchise agreements were lawfully cancelled constituted trademark infringement under § 1114(1)(a) of the Lanham Act. We also hold that it was error to award profits, a trademark infringement remedy, for breach of the franchise agreements. While it may be tempting to simply treat the profits fixed as damages for the breach of contract as the proper measure of recovery for the Lanham Act trademark infringement and, consequently, avoid the necessity of a remand, such a course of action would be an improper exercise of our appellate role.

[27-31] The damages provision of the Lanham Act stipulates:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, *and subject to the principles of equity*, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In

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10. The district court stated that the profits award prevented Mason's "unjust enrichment" from the breach. An accounting of profits may be appropriate to prevent the unjust enrichment of a trademark infringer, *see, e.g., Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582 (5th Cir.1980), but does not comport with the compensatory nature of breach of contract damages.

> assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court *may* enter judgment, *according to the circumstances of the case*, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court *may in its discretion* enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in *exceptional cases may award* reasonable attorney fees to the prevailing party.

15 U.S.C. § 1117 (emphasis supplied).

This section vests considerable discretion in the district court. Guided by the principles of equity, the court may award the defendant's profits. Additional extraordinary relief such as treble damages and attorney's fees are available under the statute if the district court believes that such an assessment would be just. The statute also provides for the adjustment of any profits award if it is inadequate or excessive. This remedial accommodation clearly envisions the exercise of the trial judge's discretion. Consequently, it would be inappropriate for this court to attempt a determination of damages in the first instance. *See Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Mfg., Inc.*, 597 F.2d 71, 78 (5th Cir.1979). This is the traditional and statutory function of the district court.[11]

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11. We are cognizant of Mason's position that a recovery of profits would be improper for this trademark violation and

(Continued on following page)

V. Attorney's Fees

After an extensive hearing, the district court found that BKC was entitled to recover $884,924.80 in attorney's fees and $94,570.83 in related expenses. The court denied BKC's claim for attorney's fees for the services performed by its "in-house" lawyers. Mason challenges the award on several grounds. BKC contends that it is entitled to fees for the services of its house counsel.

A. Contract Provision

[32] Approximately $600,000.00 of the fee award was allocated to work done in connection with the termination of the development agreements. The attorney's fees provision of the development agreements states that:

> In the event Developers [Mason] dispute Burger King Corporation's termination of this Agreement and *legal action* is commenced, Developers shall indemnify and

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Footnote continued—

that any such assessment would be an abuse of discretion. We set aside the profits as damages only because they are unauthorized for the breach of the franchise agreements and do not now express any opinion on this issue. However, in the interests of avoiding another appeal, we note certain principles that should guide the district court in the exercise of its discretion on remand. First, an award of attorney's fees is proper only in "exceptional cases"—the elements of bad faith or fraud must be present to support the grant of attorney's fees. *See Safeway Stores, Inc. v. Safeway Discount Drugs, Inc.*, 675 F.2d 1160, 1169 (11th Cir.1982); *Durbin Brass Works, Inc. v. Schuler*, 532 F.Supp. 41, 44 (E.D.Mo.1982); *Salton Inc. v. Cornwall Corp.*, 477 F.Supp. 975, 992 (D.N.J.1979). Second, there is no automatic right to enhanced damages. Trial judges have wide latitude in determining a just amount of recovery for trademark infringement. *See Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 935 (5th Cir.1982). Finally, although an accounting of profits can be an effective means to prevent the unjust enrichment of the infringer. *Maltina Corp. v. Cawy Bottling Co.*, 613 F.2d 582 (5th Cir.1980), all monetary awards under § 1117 are "subject to the principles of equity." In short, contrary to the assertions of both parties, no hard and fast rules dictate the form or quantum of relief.

> reimburse Burger King Corporation for costs and attorney's fees in successfully *defending such action.*

Exh. 289, R. 4500-4554 (emphasis supplied). Mason urges that because BKC initiated the action against it, seeking a declaratory judgment on the propriety of the terminations, attorney's fees are not authorized under this provision of the contract. According to Mason, fees are available only for the *defense of legal action* relating to termination of the development agreements.

We agree that BKC could not claim attorney's fees pursuant to this clause of the contract unless it was put to the task of defending legal action concerning the terminations. It seems clear to us that the term "action" appearing near the end of the provision refers to the "legal action" mentioned at the beginning, as opposed to the "action" of terminating the agreements in general. However, this observation does not negate the right to attorney's fees since BKC did in fact defend legal action to uphold the terminations. In response to BKC's original complaint, Mason contended that the development agreements were illegally cancelled and filed a counterclaim for specific performance and damages for wrongful termination. By this counterclaim, BKC was placed in the position of defending a lawsuit for wrongful termination of the development agreements—a situation squarely within the terms of the attorney's fee provision.

[33] Under Florida law, a contract which provides for the payment of attorney's fees is binding and must be enforced by the trial court. *See, e.g., Brickell Bay Club Condominium Ass'n, Inc. v. Forte,* 397 So.2d 959, 960 (Fla. Dist.Ct.App.), *petition for review denied,* 408 So.2d 1092 (Fla.1981); *Silver Blue Lake Apartments, No. 3, Inc. v. Manson,* 334 So.2d 48 (Fla.App.1976). Consequently, the

district court did not err in awarding attorney's fees as provided in the contract.

B. Computation of Fees

[34] The district court determined that 68% of the total time which BKC's attorneys devoted to the Mason-BKC litigation was spent on issues compensable under the terms of certain contracts or pursuant to Florida Statute § 57.105. In reaching this conclusion, the court stated:

> [23] Burger King's attorneys failed to maintain their time records in a fashion which would facilitate, an easy delineation by the Court between fees attributable to compensable and non-compensable matters. This necessarily leads to a certain imprecision in the Court's allocation
>
> . . . . .
>
> 25. Burger King's counsel worked on both issues for which attorney's fees can properly be awarded and on other non-compensable issues. The fees and disbursement which Burger King has paid [to its outside lawyers] must be allocated among the various issues in the case. While no mathematically precise allocation can be made because of the overlapping of issues and the absence of specific detailed records, the court is still in a position to make a competent and reasonable allocation. Such allocation is as follows:
>
> 1. The termination of development agreements—45%
>
> 2. Promissory notes and leases—20%
>
> 3. The successful defense of claims to which Fla. Stat. § 57.105 is applicable—3%.

> 26. The percentage allocation in the above finding is based upon the evidence presented at trial and the court's own familiarity with the case . . . .

Findings of Fact and Conclusions of Law, April 5, 1982.

Mason challenges this method of assessing the fees, claiming that attorney's fee awards are an abrogation of the common law and, as such, strong proof of entitlement is mandatory. Mason urges this court to disallow the award or reduce it substantially because of BKC's failure to maintain precise issue-by-issue time records. Mason cites a number of bankruptcy cases for the proposition that fees must be denied when the attorney's time records are inadequate. *See, e.g., In re First Colonial Corp. of America,* 544 F.2d 1291 (5th Cir.1977), *cert. denied,* 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977); *In re Meade Land & Development Co., Inc.,* 527 F.2d 280 (3d Cir.1975); *In re Orbit Liquor Store,* 439 F.2d 1351 (5th Cir.1971).

This argument is unpersuasive. As the district court noted, the issues in this case overlapped to a significant extent. For example, BKC's proof of its grounds for termination of the development agreements (a compensable issue) also served as proof of the propriety of some of the franchise terminations (a non-compensable issue). The district judge was forced into the role of a referee in the conduct of this litigation over an extended period of time. Needless to say, he was intimately familiar with the issues in the case. He was in an excellent position to estimate the amount of lawyer time devoted to the various issues before him.

Moreover, the Flordia appellate courts have approved of attorney's fees awards based upon estimates by the trial judge of the time reasonably necessary to the ultimate task. *See, e.g., Florida Department of Natural Resources*

v. Gables-By-the-Sea, Inc., 374 So.2d 582, 585 (Fla.Dist.Ct. App.1979), *cert. denied*, 383 So.2d 1203 (1980). *Cf. R.H. Coody & Assoc., Inc. v. Shelton*, 352 So.2d 852 (Fla.1977) (court found rate excessive but did not object to estimate of time when attorney did not keep time records). Indeed, in *Gables-By-the-Sea*, the appellate court sanctioned an attorney's fee determination in a case in which the trial judge stated:

> The [c]ourt recognizes that in this case hours were not specifically kept and the hours that were stated as estimates are estimates . . . Considering the testimony . . . the [c]ourt is awarding the sum of $850,000 in attorneys' fees.

374 So.2d at 585. Mason was responsible for BKC's attorney's fees because the parties agreed to such indemnification by contract. Florida law permits attorney's fees to be determined in the manner employed by the district court. Under the circumstances, the fee satisfies the reasonableness standard.

C. Florida Statute § 57.105

The district court ruled that 3% of BKC's attorney's fees were attributable to the defense of claims governed by Florida Statute § 57.105. That statute provides:

> The Court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the Court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

In granting attorney's fees under § 57.105 because of Mason's prosecution of Counts III, VII and X of the second amended counterclaim, the court stated only that Counts

III and VII had been voluntarily dismissed and Count X was dismissed by a directed verdict. Mason maintains that under Florida law, a voluntary dismissal or a directed verdict does not justify the application of § 57.105. BKC concedes the correctness of this interpretation of Florida law, but insists that Counts III, VII and X were frivolous, and hence, the district court properly invoked the sanctions of § 57.105.

[35, 36] Even though the purpose of § 57.105 is to prevent the "reckless waste of judicial resources as well as the time and money of prevailing litigants", *Whitten v. Progressive Casualty Insurance Co.*, 410 So.2d 501, 505 (Fla.1982), the § 57.105 award must be remanded to the district court because of a technical defect in its order. In *Whitten*, the Florida Supreme Court stated:

> The statute [§ 57.105] provides that a party is entitled to an award of attorney's fees only when the court determines that there was a complete absence of a justiciable issue raised by the losing party. Without such a finding, an order assessing attorney's fees is technically deficient and must be reversed.

410 So.2d at 506. In holding that the failure to make such a finding invalidates an award under § 57.105, the Florida court cited a number of Florida appellate decisions. Significant to our review, however, is the *Whitten* court's "but see" citation to *Autorico, Inc. v. Government Employees Insurance Co.*, 398 So.2d 485, 488 (Fla.Dist.Ct.App. 1981). *Autorico* held that the absence from the order of the magic words "complete absence of a justiciable issue of law or fact" required by the statute does not invalidate the award. The *Autorico* appellate court reasoned that since § 57.105 governs only when there is a complete absence of a justiciable issue the requisite finding "is implicit in an

order which grants a motion for said fees based entirely upon [§ 57.105]." 398 So.2d at 488.

Were we writing on a clean slate, the *Autorico* analysis might have more appeal. It is obvious to us that by awarding fees pursuant to § 57.105, the trial judge found that the claims met that statutory standard. Nevertheless, we are bound to follow the Florida Supreme Court's later pronouncement in *Whitten* which compels the trial court to spell out its finding of the statute's requirements. At least one Florida appellate court since the *Whitten* decision has construed *Whitten* as requiring a remand of an award made "pursuant to § 57.105" because the trial court did not include the statute's language in its order. *Apgar & Markham Construction of Florida, Inc. v. Macasphalt*, 424 So.2d 41 (Fla.Dist.Ct.App.1982). We have been unable to locate any more recent authority to the contrary. In light of the Florida cases available to us, we have no alternative but to remand the § 57.105 award to the district court for a determination of whether Counts III, VII and X presented any justiciable issues of either law or fact. *Id.* at 42.[12]

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12. Although our remand of this award makes appellate review premature, we nevertheless emphasize that attorney's fees can be granted under § 57.105 when claims have been dismissed or defeated *as long as* no justiciable issues of law or fact were raised by the claims. *Fierer v. 18th Avenue Development Corp.*, 417 So.2d 1005 (Fla.App.1982). Although the dismissal by itself will not support an award, *Executive Centers of America, Inc. v. Durability Seating & Interiors, Inc.*, 402 So.2d 24 (Fla.Dist.Ct. App.1981), "voluntary dismissal is not a bar to an award of attorney's fees." *Fierer*, 417 So.2d 1005.

The Florida Supreme Court has approved the following standard for the application of the attorney's fees statute:

> The requirement . . . is a finding of a *total or absolute* lack of a justiciable issue, and to us, this is tantamount to a finding that the action is frivolous . . . .
>
> [A] trial court must find that the action is so clearly devoid of merit *both* on the facts and the law as to be completely untenable.

(Continued on following page)

D. In-House Counsel Fees

[37] Finally, BKC assigns as error to the district court's refusal to include the services of its house counsel as a part of the attorney's fees. In rejecting BKC's request, the district court stated:

> Attorney's fees for the services of in house counsel are not recoverable. There is no precedent in Florida law for an award of attorney's fees for the services of in-house counsel. Cases from other jurisdictions awarding fees for the services of in-house counsel who actively tried the case are not factually similar to this case when in-house counsel acted primarily as a liaison between the client and outside counsel who had complete responsibility for the conduct of the case.

Findings of Fact and Conclusions of Law, April 5, 1982.

We agree with the district court. First, there is no Florida authority to justify, much less mandate, such an award. *Travelers Indemnity Co. v. Thomas*, 315 So.2d 111 (Fla.Dist.Ct.App.1975), *cert. denied*, 336 So.2d 108 (Fla. 1976), upon which BKC places significant reliance, does not support BKC's position. In *Travelers Indemnity*, the court indicated in *dicta* that a party could recover the

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Footnote continued—

Allen v. Estate of Dutton, 384 So.2d 171, 175 (Fla.App.), *petition for review denied*, 392 So.2d 1373 (Fla.1980) (emphasis in original) (cited with approval in *Whitten v. Progressive Casualty Ins. Co.*, 410 So.2d 501, 505 (Fla.1982)). The Florida appellate courts have insisted upon strict compliance with the *Allen* standard. *See, e.g., Lake Osborn Utilities Co., Inc. v. Sims*, 411 So.2d 994 (Fla.Dist.Ct.App.1982); *Braden River Civic Ass'n, Inc. v. Manatee County*, 403 So.2d 1007 (Fla.Dist.Ct.App.1981). Nonetheless, one Florida appellate court affirmed an award under § 57.105 when, for example, the plaintiff alleged interference with business relations and the evidence did not support any of the elements of the tort. *Kisling v. Wooldridge*, 397 So.2d 747 (Fla.Dist.Ct.App.1981).

reasonable value of services performed by in-house counsel "in instances where the defense *was furnished by* house counsel." *Id.* at 114 (emphasis supplied). As the district court found, however, BKC's lawyers acted only in a liaison capacity. Outside counsel was responsible for handling the case. Our reading of *Travelers Indemnity* confirms that the court did not intend to suggest, much less require, that in-house counsel fees should be assessed in this situation.

[38] Second, a recovery of the "reasonable value" of BKC's in-house lawyers' time is not necessary to indemnify BKC for the expenditures incurred as a result of the litigation.[13] A contract provision which specifies that attorney's fees must be paid in the event of litigation is enforceable in Florida "as an agreement for indemnification." *Trustees of Cameron-Brown Investment Group v. Tavormina*, 385 So.2d 728, 731 (Fla.Dist.Ct.App.1980). BKC did not have to pay out additional money for the services of its house counsel, so it cannot claim "reimbursement" for this pro-rata share of its fixed corporate expense. The district court did not err in declining to charge Mason an amount representing either the cost or the value of BKC's corporate employees.

VI. Conclusion

We have examined the remaining issues raised by the parties: (1) the district court's refusal to direct a verdict for Mason on the franchise terminations based upon the pledge of stock to the Pittsburg National Bank and the sale of stock to John Mosher prior to BKC's approval of

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13. The development agreement attorney's fees provision, which was the basis for the vast majority of the fees awarded, specifically provided that Mason would "indemnify and reimburse" BKC for attorney's fees.

the transfer of the franchise agreement to the corporation; (2) the district court's direction of a verdict against BKC on the franchise termination predicated upon a transfer of an interest in the profits of a restaurant; and (3) the district court's alleged abuse of discretion in limiting the cross-examination of Helen O. Donaldson and excluding a letter from Mason's accountant to BKC offered during the cross-examination. After careful consideration, we find these assignments of error lack any merit and warrant no further discussion.

We VACATE the attorney's fees award made pursuant to Fla.Stat. § 57.105 and the damages assessed for breach of the franchise agreements. We REMAND to the district court for (1) a finding of whether the statutory requirements of Fla.Stat. § 57.105 were satisfied in its award of attorney's fees and (2) a determination of the relief under the Lanham Act, 15 U.S.C. § 1117. In all other respects, the judgment of the district court is AFFIRMED.

APPENDIX

SPECIAL ISSUE NO. 5

With respect to BURGER KING CORPORATION's claims regarding termination of the franchise agreements, we the jury find that:

A. BURGER KING CORPORATION properly terminated all of the franchise agreements. _____

or

B. BURGER KING CORPORATION wrongfully terminated all of the franchise agreements. _____

or

(C.) BURGER KING CORPORATION properly terminated the franchise agreements covering the restaurants listed in Column 1 and wrongfully terminated the franchise agreements covering the restaurants listed in Column 2.

1	2
Franchise Agreements Terminated Properly	Franchise Agreements Terminated Improperly
[redacted]	[redacted]
[redacted] None	#463
[redacted]	[redacted]
[redacted]	#837
[redacted]	[redacted]
[redacted]	#1127
[redacted]	#1201
[redacted]	[redacted]
[redacted]	#1360
[redacted]	#1689
[redacted]	#179
[redacted]	[redacted]
[redacted]	#1863
[redacted]	#1887
[redacted]	#2024
[redacted]	[redacted]
[redacted]	#2247
[redacted]	#2249
[redacted]	[redacted]

ORDER OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA DATED OCTOBER 31, 1980

(Filed October 31, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION,
Plaintiff,

-v-

GERALD A. MASON, et al.,
Defendants.

ORDER

THIS MATTER has come before the Court on the following post trial motions:

1. Plaintiff's motion for clarification of the jury verdict as to Special Issues No. 1 & 2.

2. Plaintiff's motion for a judgment notwithstanding the verdict as to Special Issues No. 1 & 2.

3. Plaintiff's motion for a judgment notwithstanding the verdict as to Special Issue No. 5.

4. Plaintiff's motion for a new trial as to Special Issue No. 5.

5. Plaintiff's motion for a judgment notwithstanding the verdict as to Special Issue 6.

The Court has reviewed these motions and the memoranda submitted in their support, as well as the papers filed in opposition. In addition, the Court has had the benefit of oral argument on these matters. Based upon an evaluation of the arguments presented, in light of the entire record in this cause, it is

ORDERED AND ADJUDGED as follows:

1. The motion for clarification of the jury verdict as to Special Issues No. 1 & 2 is Denied.

2. The motion for a judgment notwithstanding the verdict as to Special Issues No. 1 & 2 is Denied.

Although the motions pertaining to Special Issues Number 1 & 2 which seek clarification of the jury's verdict and/or entry of a judgment notwithstanding the verdict are denied, an alternative form of relief is appropriate. The awards of money damages in favor of Burger King on both the promissory notes and the accounts receivables establish liability against the defendants. The verdict award of $1.00 on promissory notes with a face value of close to $900,000.00 and the verdict award of $100,000.00 on accounts receivable with a book value of over $500,000.00 are contrary to the weight of the evidence presented at trial. Therefore, a new trial shall be held on the issue of damages alone with respect to the promissory notes covered in Special Issue No. 1 and the accounts receivable covered in Special Issue No. 2.

3. The motion for a judgment notwithstanding the verdict as to Special Issue No. 5 is Denied. There was sufficient competent evidence presented to the jury from which they could have concluded that some of the franchises were improperly terminated.

4. The motion for a new trial as to Special Issue No. 5 is granted in part and denied in part. The jury

determined that the franchise agreements covering restaurants #436, #837, #1127, #1201, #1360, #1689, #1791, #1863, #1887, #2024, #2247 and #2249 were improperly terminated. There was sufficient evidence presented to the jury from which they could arrive at such a finding. Therefore, the motion for a new trial as is relates to these restaurants is Denied.

It is very uncertain from the jury's answer to Special Issue No. 5 whether they made any determination as to the other restaurants. Because of the substantial rights and property interests at stake, it would not serve the bests interests of justice for the Court to attempt to read the jury's mind in an effort to resolve this ambiguity. Therefore, the motion for a new trial as it relates to the propriety of the termination of the franchise agreements covering restaurants #164, #285, #302, #473, #545, #583, #597, #606, #1055, #1091, #1253, #1802 and #2080 is Granted.

5. The motion for a judgment notwithstanding the verdict as to Special Issue No. 6 is denied. There was sufficient competence presented to the jury from which they could have determined that the defendants did not engage in a conspiracy to defraud Burger King.

DONE AND ORDERED this 31st day of October, 1980.

/s/ Edward B. Davis
United States District Court
Judge

Copies Furnished To:

Andrew C. Hall, Esq.
Lee N. Abrams, Esq.
Edward Kaufman, Esq.

ORDER OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED FEBRUARY 20, 1981

(Filed February 24, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION,
Plaintiff,

-v-

GERALD A. MASON, et al.,
Defendant.

ORDER

THIS MATTER has come before the Court on the following motions:

1. The Motion of the Plaintiff for Bifurcation;
2. The Motion of the Plaintiff for Leave to Amend the Second Amended Complaint; and
3. The motion of the Defendants for Certification Pursuant to 28 U.S.C. §1292(b).

The Court has considered these motions, as well as the papers filed in opposition. Based upon this evaluation, in light of the entire record in this cause, it is

ORDERED AND ADJUDGED as follows:

1. The Motion for Bifurcation is Denied. All remaining issues will be tried in one proceeding.

2. The Motion to Amend the Complaint is granted in part and denied in part. Plaintiff's motion to amend paragraph 289 is granted. Plaintiff's motion to amend the Complaint in order to add Count XXXX is denied as to proposed paragraphs: 417, 419, 420, 424, 425, 427, 428, 429, 431 and 432. These paragraphs deal with matters which have already been the subject of a jury determination. The motion, however, is granted as to all other paragraphs of the proposed amendment.

3. The Motion for Certification pursuant to 28 U.S.C. §1292(b) is Denied. The issue which the Defendants seek to appeal is simply not a controlling question of law.

DONE and ORDERED this 20th day of February, 1981.

/s/ Edward B. Davis
U.S. District Court Judge

cc: Counsel of Record

ORDER OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED MAY 20, 1981

(Filed May 21, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION,
Plaintiff,

-v-

GERALD A. MASON, et al.,
Defendants.

ORDER

THIS MATTER has come before the Court on the following motions:

1. The motion of the plaintiff for partial summary judgment;
2. The motion of the defendants to dismiss Counts XXXVI through XXXIX;
3. The motion of the defendants to dismiss Count XXXX.

The Court has reviewed the motions, as well as the papers filed in opposition. Upon consideration of the arguments presented, in light of the entire record in this case, it is

ORDERED AND ADJUDGED as follows:

1. The motion of the plaintiff for partial summary judgment is Granted. The liability of the Defendant has already been determined. The amount due is the only unresolved issue with regard to the plaintiff's claims on the notes and receivables. The affidavit of Thomas F. Crummey, Vice President and Treasurer of Burger King Corporation, is competent and unrefuted. Therefore, partial summary judgment is hereby entered in favor of the plaintiff, Burger King, in the amount of One Million Seven Hundred Sixty-Three Thousand Six Hundred Ninety-Two Dollars and Forty cents ($1,763,692.40).

Because this figure as reflected in the affidavit is the amount outstanding as of February 15, 1981, the plaintiff is granted leave to file supplementary affidavits which reflect any additional obligations on the notes and receivables since that date.

2. The motion to dismiss Counts XXXVI through XXXIX is Granted in part and denied in part. The motion to dismiss as to Counts XXXVI, XXXII and XXXVIII is Denied. As to Count XXXIX, the motion is granted with respect to the prayer for damages. *L.J.S. Company v. Marks*, 480 F.Supp. 241 (S.D.Fla. 1979). The motion is denied as to the other portions of Count XXXIX dealing with declaratory and injunctive relief.

In Count XXXIX the defendants have raised a constitutional challenge to the application of the Florida Deceptive and Unfair Trade Practices Act to the facts of this case. No legal authority is cited in support of the argument. The defendants are granted leave to file a supplementary memorandum of law which more fully considers this issue.

3. The motion to dismiss Count XXXX is Denied. This count sets forth a cause of action in a fashion sufficient to afford the defendants with fair notice of the nature of the claim.

DONE AND ORDERED this 20th day of May, 1981.

/s/ Edward B. Davis
United States District Court
Judge

Copies Furnished To:

Lee N. Abrams, Esq.
Edward Kaufman, Esq.
Mark Peddecord, Esq.
Andrew Hall, Esq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW SEPTEMBER 18, 1981

(Filed September 18, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION, a
Florida corporation,
Plaintiff,

-vs-

GERALD A. MASON, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter has come before the Court for trial on the claim of the plaintiff, BURGER KING CORPORATION, for equitable rescission of the franchise agreements covering Restaurant #1253 in Johnstown, Pennsylvania, Restaurant #1802 in Altoona, Pennsylvania, and Restaurant #2080 in Carlisle, Pennsylvania. Burger King's claim for rescission is set forth in Count XXXX of Second Amended Complaint. Sitting in its capacity as a court of equity, the Court heard and considered the evidence presented by both the plaintiff and the defendants. Based upon an evaluation of the evidence, in light of the applicable precedent, the Court does make and enter the following Findings of Fact and Conclusions of law.

FINDINGS OF FACT

1. In late 1972, Defendants Mason, Szabo and Hardy submitted to Burger King Corporation a standard Burger King Multiple Franchise Application for a license to operate a Burger King restaurant in Johnstown, Pennsylvania. This restaurant was subsequently designated as Restaurant #1253.

2. The capitalization plan submitted as part of the application represented that the defendants intended to capitalize the Johnstown restaurant with $37,000.00 of equity capital and $37,000.00 of non-real estate debt.

3. The capitalization plan was part of the standard application required by the application form and indicated the manner in which the defendants' proposal to capitalize the subject restaurant as of its opening date.

4. Burger King's Financial Analysis Department gave financial approval of defendants' franchise application on December 7, 1972.

5. On January 4, 1973, Burger King approved defendants' application to operate the restaurant in Johnstown, Pennsylvania.

6. As of the opening date of the Johnstown restaurant, the actual debt-to-equity was not the same as that proposed in the capitalization plan. The actual level of debt incurred by the franchise at the opening was in excess of the amount proposed in the capitalization plan.

7. On or about January 4, 1974, Burger King's Financial Analysis Department prepared a consolidated debt-to-equity spread sheet in connection with Defendants' application for a separate franchise unit in Butler, Pennsylvania. This spread sheet reflected the debt-to-equity situation of each of Defendants' franchises in operation at that

time, including Store #1253. The financial information with regard to such stores reflected in this debt-to-equity spread sheet were obtained from balance sheets for the respective restaurants on file with Burger King for the period ending September 30, 1973. The debt-to-equity ratio of Store #1253, as reflected by its September 30, 1973 quarterly balance sheet and by the January 4, 1974 debt-to-equity spread sheet was infinity to one, consisting of $60,000.00 in long-term debt to outside creditors, no loans from franchises and a negative $7,000 retained earnings.

8. Burger King never made any objections to the defendants with regards to the manner in which Restaurant #1253 had initially been capitalized prior to the filing of this lawsuit.

9. In early 1976, the defendants Mason, Szabo and Hardy submitted an application for a license to operate a Burger King restaurant in Altoona, Pennsylvania. The restaurant was subsequently designated as Burger King licensed Restaurant #1802.

10. As part of the application, a capitalization plan was submitted which represented that the defendants intended to capitalize the restaurant with $143,000.00 of equity capital and non-real estate debt.

11. $133,000.00 of the equity capital described in the capitalization plan represented shareholder loans. No subordination agreements were submitted by the defendants with respect to these loans nor were any subordination agreements ever submitted in conjunction with shareholder loans applicable to other Burger King franchises owned by the defendants.

12. It was Burger King's standard policy to require subordination agreements in order for loans from franchisee shareholders to be treated as equity rather than debt.

13. Notwithstanding the lack of shareholder subordination agreements and in contravention of the company's stated policy, Burger King's Financial Analysis Department gave financial approval to the defendants' Franchise Application on May 19, 1976.

14. On June 3, 1976, Burger King's National Development Committee gave final approval to the defendants' application for a license to operate the restaurant in Altoona, Pennsylvania.

15. As of the opening date of this restaurant, the actual debt-to-equity ratio was not the same as was proposed in the capitalization plan and the amount of equity invested in the restaurant was less than that proposed in the capitalization plan.

16. During the first week of May, 1977, Defendants forwarded to Burger King's Financial Analysis Department a quarterly balance sheet for Store #1802 for the period ending March 31, 1977. This quarterly balance sheet reflected long-term liabilities in the total amount of $142,194.00, no loans from stockholders or owners, no capital stock or owner investment, no capital surplus and retained earnings of approximately negative $12,000.00. Under Burger King's method of calculating debt-to-equity ratios, this balance sheet reflected an infinite debt-to-equity ratio as of the date of that financial statement, approximately five months after the opening of the restaurant.

17. Prior to the filing of this lawsuit, Burger King never objected to the defendants concerning the manner in which Restaurant #1802 had initially been capitalized.

18. In late 1976 or early 1977, Defendants Mason, Szabo and Peterson submitted a standard Burger King Multiple Franchise Application for a franchise restaurant to be located in Carlisle, Pennsylvania. This restaurant

was subsequently designated as Burger King licensed Restaurant #2080.

19. As part of the standard application for Restaurant #2080, the defendants submitted a capitalization plan. In this capitalization plan, the defendants proposed to open the restaurant with a total investment of $149,500.00 consisting of $125,000.00 in shareholder loans and $24,500.00 in owners' equity. No subordination agreement was ever submitted with this application.

20. Notwithstanding the lack of any subordination agreements covering the shareholder loans for the Carlisle restaurant, Burger King's Financial Analysis Department gave financial approval to the defendants' franchise application on August 10, 1976.

21. On July 3, 1977, Burger King's National Development Committee gave final approval to the defendants' application for a license to operate the restaurant in Carlisle, Pennsylvania.

22. As of the opening date of this restaurant, the actual debt-to-equity ratio was not the same as was proposed in the capitalization plan, in that the actual debt level incurred by the franchise at that time was in excess of the amount proposed and the amount of equity invested was less than the amount proposed.

23. Approximately eight months after the Carlisle restaurant opened, the defendants submitted a quarterly balance sheet to Burger King's Financial Analysis Department reflecting long term indebtedness of approximately $335,043.00, no loans from stockholders or owners, approximately $3,000.00 of owner invested equity, no capital surplus and retained earnings of approximately $8,156.00.

24. Prior to the filing of this lawsuit, Burger King never objected to the defendants concerning the manner in which Restaurant #1253 had been initially capitalized.

25. Standard Burger King operating procedure makes it mandatory for its franchisees to submit quarterly balance sheets to its Financial Analysis Department. The date contained on these sheets provides the Financial Analysis Department with sufficient information to compile the debt-to-equity ratio of a franchise as of the date of the statement within a reasonable degree of certainty.

26. Even though Burger King could compute the debt-to-equity ratio, they did not review the quarterly balance sheets, which they required, for any of the restaurants involved in this lawsuit during their first year of operation in order to detect capitalization deficiencies and cash flow problems.

27. It is Burger King's standard policy to initially require a one-to-one debt-to-equity ratio.

28. It is Burger King's standard policy to compute a consolidated debt-to-equity ratio for all of a franchisee's existing restaurants when that franchisee applies for an additional franchise unit. The Financial information utilized by Burger King's Financial Analysis Department in computing this consolidated debt-to-equity ratio is derived from the most recent quarterly balance sheets contained in Burger King's files.

28. On or about April 28, 1975, Burger King's Financial Analysis Department prepared a consolidated debt-to-equity ratio spread sheet in connection with the defendants' application for two additional units in the Pittsburgh area. This calculation was made approximately one year after the opening of defendants' restaurants #1382 and #1358. At the time of this computation, the

capitalization position of Restaurants Nos. 1382 and 1358 reflected an infinite debt-to-equity ratio. The head of Burger King's Financial Analysis Department gave financial approval to the defendants' application for the additional units in the Pittsburgh area despite the infinite debt-to-equity ratios on two of the defendants' franchises which had been opened for only one year.

29. There is no evidence of any secret plan on the part of the defendants which demonstrates an intention to capitalize the restaurants in a different manner than that proposed in the capitalization plans.

30. The defendants did not deliberately conceal from Burger King the facts upon which the claims for rescission are based. The defendants disclosed such facts through the submission of quarterly balance sheets which reflected actual rather than projected conditions.

31. Within one year from the opening date of each of the three restaurants at issue, Burger King Corporation had actual knowledge or had been provided with sufficient information from which it could and should have obtained actual knowledge of the actual initial capitalization of the three subject restaurants, and despite such knowledge, Burger King never objected to Defendants as to the manner in which the subject restaurants were capitalized, continued to grant to Defendants additional franchises, and continued to accept from Defendants the payment of franchise fees, royalties on sales, and advertising contributions based on sales.

32. There has been no proof that Burger King has sustained any pecuniary loss or other actual damage as a result of entering into the franchise agreements for Restaurant Nos. 1253, 1802 and 2080.

33. Burger King Corporation unreasonably delayed in asserting its claim against Defendants for rescission with regard to the subject franchises despite its knowledge of the actual initial capitalization of the subject restaurants. Defendants have been prejudiced by such delay in that they have continued to invest their own time and money in the operation of these restaurants under the reasonable assumption that Burger King Corporation did not object to the manner in which the subject franchises were capitalized.

34. Notwithstanding the language in Burger King's Franchise Application, the capitalization plans submitted by the defendants in connection with Restaurants Nos. 1253, 1802 and 2080 were not materially relied upon by Burger King in approving these applications.

CONCLUSIONS OF LAW

1. In order to prevail upon an equitable claim for rescission under Florida law, the plaintiff must establish (1) that the defendants made a material misrepresentation; (2) that the representation was material to the Plaintiff's decision to enter into the subject contract; (3) that the Plaintiff reasonably relied upon such misrepresentations; and (4) that in reliance upon the misrepresentations, the Plaintiff is caused to act to its own detriment or injury. *Robson Link & Co. v. Leedy Wheeler & Co.*, 18 So.2d 523 (Fla.1944).

2. Burger King failed to seek rescissions of the franchise agreements for Restaurant Nos. 1253, 1802 and 2080, despite having actual or imputed knowledge of the capitalization. This lack of diligence in timely asserting the rescission claim coupled with Burger King's failure to follow its own standard procedure amounts to a waiver of any

right which it may have had to rescind the subject franchise agreements.

3. Burger King's continued acceptance of the benefits accruing to it under the franchise agreements for Restaurant Nos. 1253, 1802 and 2080 despite its actual or imputed knowledge of the true initial capitalization of these franchises amounts to ratification by Burger King of any misrepresentation by the defendants upon which Burger King may have relied in entering into the franchise agreements.

4. Burger's King's lack of diligence in timely seeking rescission of the franchise agreements for Restaurant Nos. 1253, 1800, and 2080 despite its actual or imputed knowledge of the true initial capitalization of these restaurants caused the defendants to continue to invest their time and money in these operations to their detriment and injury to the extent that rescission is barred by the doctrine of laches.

5. Burger King has failed to establish by a preponderance of the evidence that it has suffered any injury or detriment sufficient to justify rescission of the defendants' franchises as a result of any reliance which it placed upon the capitalization plans for Restaurant Nos. 1253, 1802 and 2080.

Based upon the foregoing Findings of Fact and Conclusions of law, it is

ORDERED and ADJUDGED that judgment is hereby entered in favor of the Defendants, Mason, Hardy, Peterson and Szabo and against the Plaintiff, Burger King Corporation, on its claim for equitable rescission of the franchise agreements covering Restaurant Nos. 1253, 1802 and 2080.

DONE and ORDERED this 18th day of September, 1981.

/s/ Edward B. Davis
United States District Court Judge

Copies Furnished to:

Andrew C. Hall, Esq.
Lee Abrams, Esq.
Edward Kaufman, Esq.

FINDINGS OF FACT AND CONCLUSIONS OF LAW NOVEMBER 25, 1981

(Filed November 25, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION, a
Florida corporation,
Plaintiff,

-vs-

GERALD A. MASON, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER has come before the Court on the claim of the Plaintiff, BURGER KING CORPORATION, for compensatory damages based upon the termination of franchisee agreements covering restaurants bearing the following numbers: #164 in Harrisburg, Pennsylvania; #285 in Mechanicsburg, Pennsylvania; #1055 in Hershey, Pennsylvania; #597 in Johnstown, Pennsylvania; #606 in State College, Pennsylvania; #1253 in Johnstown, Pennsylvania; #302 in Roseland, Indiana; #583 in Elkhart, Indiana; #1358 in South Bend, Indiana; #473 in W. Lafayette, Indiana; #545 in Lafayette, Indiana; #1091 in Lafayette, Indiana and #1382 in Independence, Missouri. On September 21 and 22, 1981, a bench trial was conducted on these issues. Based upon the evidence presented, in light of the entire record in this case, the Court does make

and enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Burger King Corporation is the owner of various trademarks and service marks, including "Burger King" and "Home of the Whopper", and said marks are in full force and effect under the Lanham Act and the common law. Burger King Corporation is in the business of licensing franchisees to use those trademarks and service marks, and other unique systems, names and marks, in connection with the operation by its franchisees of hamburger-oriented, limited menu fast food restaurants throughout the United States and abroad.

2. At various times between 1969 and 1974, Burger King Corporation and certain of the Defendants entered into thirteen separate franchise agreements, each of which licensed the named franchisees to operate a Burger King restaurant at a specified location. The location of the restaurant, the named franchisees and the date the franchise agreement was entered into are as follows:

Restaurant Number	Location	Named Franchisees	Date of Franchise Agreement
164	Harrisburg, Pa.	D. W. Szabo G. A. Mason R. A. Peterson	4/1/74
285	Mechanicsburg, Pa.	D. W. Szabo G. A. Mason R. A. Peterson	4/1/74
1055	Hershey, Pa.	D. W. Szabo G. A. Mason R. A. Peterson	4/1/74
597	Johnstown, Pa.	D. W. Szabo W. S. Hardy	9/22/69
606	State College, Pa.	W. S. Hardy E. Lamb, Jr.	3/21/70
1253	Johnstown, Pa.	S. W. Szabo W. S. Hardy G. A. Mason	5/11/73
302	Roseland, Ind.	W. S. Hardy G. A. Mason	4/17/72
583	Elkhart, Ind.	W. S. Hardy G. A. Mason	4/17/72
1358	South Bend, Ind.	W. S. Hardy G. A. Mason	11/30/73
473	W. Lafayette, Ind.	W. S. Hardy	1/27/69
545	Lafayette, Ind.	W. S. Hardy	5/23/69
1091	Lafayette, Ind.	W. S. Hardy	1/19/72
1382	Independence, Mo.	W. S. Hardy D. W. Szabo M. T. Peddecord	4/29/74

3. Following the execution of each of those thirteen franchise agreements, the franchisees named therein assigned the franchise agreement to an assignee corporation, as follows:

Restaurant Number	Name of Operating Corporation	Date of BKC Written Consent to Assignment
164	Dauphin Foods Corp. #1	10/18/76
285	Dauphin Foods Corp. #1	10/18/76
1055	Dauphin Foods Corp. #1	10/18/76
597	Johnstown Corp. #1	4/19/76
606	State College, Pa., No. 1, Inc.	4/19/76
1253	Johnstown Corp. #2	10/18/76
302	South Bend No. 1, Inc.	12/14/73
583	Elkhart No. 1, Inc.	12/18/73
1358	South Bend No. 1, Inc.	4/16/74
473	Lafayette Corporation No. 1	6/1/76
548	Lafayette Corporation No. 2	6/1/76
1091	Hardy Enterprises, Inc.	5/2/72
1382	Burger King of Greater Kansas City, Inc. (whose name subsequently was changed to Regal Foods, Inc.)	None

4. In August 1968, Defendant Mason acquired a 25% stock interest in Lafayette Corporation No. 1.

5. In June 1969, Defendant Mason acquired a 25% stock interest in Lafayette Corporation No. 2.

6. In December 1971, Defendant Mason acquired a 33 1/3% stock interest in Hardy Enterprises, Inc.

7. In October 1969, Defendant Mason acquired a 25% stock interest in Johnstown Corp. #1.

8. In April 1970, Defendant Mason acquired a 25% stock interest in State College, Pa., No. 1, Inc.

9. In March 1973, Defendant Szabo acquired a 25% stock interest in State College, Pa., No. 1, Inc.

10. Defendants, Mason, Hardy, Szabo and Peterson are, and at all relevant times have been, the stockholders of B-K Foods, Inc.

11. On or about June 30, 1978, Lafayette Corporation No. 1 and Lafayette Corporation No. 2 were merged into Hardy Enterprises, Inc.

12. On or about October 31, 1976, Elkhart No. 1, Inc. was merged into South Bend No. 1, Inc.

13. On or about September 30, 1977, B-K Foods, Inc. acquired all of the outstanding stock of South Bend No. 1, Inc.

14. On May 18, 1979, Burger King sent to Defendants a letter notifying them that Burger King had unilaterally determined to terminate all of Defendants twenty-seven (27) franchise agreements for their various restaurants. Only the thirteen franchise agreements listed in Finding 2 are the subject of this proceeding. The termination letter stated the following:

> "By reason of the material breaches and acts of default described above, Burger King Corporation does hereby terminate each of the franchise agreements listed on Exhibit "A" attached hereto (including the thirteen franchise agreements described in Paragraph 1, above). Please be advised that should any of you (or any corporation to which you have assigned any of the franchise agreements listed on said Exhibit "A"),

identify yourself (or itself) as a Burger King Corporation franchisee, after receipt of this Notice of Termination, Burger King Corporation will take such action as it deems necessary in order to protect itself against trademark infringements and otherwise. Further, you are directed to comply with the provisions of each applicable franchise agreement which govern the conduct of a franchisee following termination of the franchise agreement by Burger King Corporation."

15. Following the receipt of the May 18, 1979 termination letter, Defendants continued to operate each of the various franchises which had purportedly been terminated by the May 18 letter, and the Defendants continued to assert that Burger King's attempted unilateral termination of the franchise agreements was not effective, that they had not committed the various acts of default alleged by the plaintiff in its termination letter, and that such acts, if in fact they had been committed, did not in any fashion justify termination of the various franchise agreements.

16. On May 18, 1979, the Defendants operated three Burger King licensed restaurants in the South Bend/Elkhart market, two of which restaurants were leased from Burger King (commonly known as BKL's). Following May 18, 1979, Burger King has developed no new restaurants, either company-owned or franchised, in South Bend or Elkhart.

17. As of May 18, 1979, Defendants operated three restaurants in Lafayette, Indiana, two of which restaurants were BKL's and a third of which was owned by the Defendants. Following May 18, 1979, Burger King has developed no new restaurant, either company-owned or franchised, in Lafayette, Indiana.

18. As of May, 1979, the Defendants operated three restaurants which have been determined to be properly terminated in the Harrisburg ADI. Those stores, Numbers 164, 285, and 1055, were operated in and around the city of Harrisburg, itself. All three of those stores were owned by the Defendants. On or about December 24, 1979, Burger King opened a new franchise restaurant in Camp Hill, Pennsylvania, approximately 1.1 miles from store Number 285 operated by the Defendants in Harrisburg, Pennsylvania.

19. In an order dated September 4, 1981, this Court determined that Burger King Corporation had properly terminated the franchise agreements covering Restaurant #302, #473, #545, #583, #1091, #1358 and #1382 on May 18, 1979. On September 2, 1981, the jury found that Burger King Corporation had properly terminated the franchise agreements covering Restaurant #164, #285, #1055, #597, #606 and #1253 on May 18, 1979.

20. Each of the standard of Burger King Franchise Agreements signed by Defendants contained a provision requiring the franchisee, upon termination of the franchise, to cease operation of the restaurant as a Burger King restaurant, and to take certain steps in order to make the actual structure appear physically dissimilar to a Burger King restaurant.

21. Despite the May 13, 1979 termination of each of the thirteen franchise agreements, the Defendants continued to operate each of the thirteen restaurants as a Burger King restaurant, and to utilize Burger King Corporation's trademarks and service marks as part of the operation. The Defendants benefitted financially as a result of this continued use.

22. At the August 1, 1979 evidentiary hearing on Defendants' Amended Motion for Temporary Restraining Order and Preliminary Injunction, counsel for Burger King Corporation expressly advised Defendants and the Court that Burger King Corporation would agree to maintain the status quo by not interfering with Defendants' operation of their 27 restaurants as Burger King licensed restaurants pending an adjudication as to whether it had properly terminated some or all of the franchise agreements covering those restaurants. This proposal was predicated on the condition that the agreement would be without prejudice to Burger King Corporation's right to obtain relief against Defendants for their post-termination operation of each of those restaurants as a Burger King licensed restaurant in the event of a subsequent adjudication that Burger King Corporation had terminated some or all of those franchise agreements properly. Defendants thereafter did not present any evidence or arguments with respect to that portion of their July 12, 1979 amended motion which sought a preliminary injunction restraining Burger King Corporation from effectuating its termination of Defendants' franchise agreements.

23. By their conduct, the Defendants ratified to Burger King's proposal that it would agree to maintain the status quo pending an adjudication as to whether it had properly terminated some or all of the Defendants' franchise agreements, and that Defendants are estopped from challenging Burger King Corporation's simultaneous reservation of its rights which was an express condition of that proposal.

24. By reason of their continued operation of Restaurant #597 in Johnstown as a Burger King licensed restaurant after May 18, 1979, Defendants Mason, Szabo, Hardy and Johnstown Corp. #1 have been unjustly en-

riched in the amount of $122,500.00 in adjusted net profits. Those Defendants should be required to disgorge that amount by which they have been unjustly enriched.

25. By reason of their continued operation of Restaurant #606 as a Burger King licensed restaurant after May 18, 1979, Defendants, Mason, Szabo, Hardy and State College, Pa., No. 1, Inc. have been unjustly enriched in the amount of $6,600.00 in adjusted net profits. Those Defendants should be required to disgorge that amount by which they have been unjustly enriched.

26. By reason of their continued operation of Restaurant #1253 as a Burger King licensed restaurant after May 18, 1979, Defendants, Mason, Szabo, Hardy and Johnstown Corp. #2 have been unjustly enriched in the amount of $70,900.00 in adjusted net profits. Those Defendants should be required to disgorge that amount by which they have been unjustly enriched.

27. By reason of their continued operation of Restaurant #545 as a Burger King licensed restaurant after May 18, 1979, Defendants, Mason, Hardy and Hardy Enterprises, Inc. have been unjustly enriched in the amount of $16,300.00 in adjusted net profits. Those Defendants should be required to disgorge that amount by which they have been unjustly enriched.

28. The Plaintiff has failed to sustain its burden of showing what Burger King would have done in May of 1979 with regard to development and/or marketing in the South Bend/Elkhart, Lafayette, Mechanicsburg and Hershey markets. The evidence is insufficient to demonstrate that Burger King had determined, in May of 1979, that additional stores could and should be built in these markets and that it would proceed forthwith with the development of such new stores.

29. The Plaintiff has failed to introduce sufficient credible evidence to demonstrate what it would have done in developing the South Bend/Elkhart and Lafayette markets, or that its evaluation of the potential of these markets has reached a stage sufficient to warrant additional development by Burger King.

30. The Plaintiff has failed to sustain its burden of showing that the Defendants prevented it from carrying out its May 1979 development or marketing plans by virtue of their failure to close their stores or by virtue of this lawsuit.

31. The evidence is insufficient to establish that Burger King's image in the South Bend/Elkhart, Lafayette, Mechanicsburg and Hershey markets was damaged by the Defendants.

32. Defendants have not made a showing sufficient to demonstrate that they are entitled to a preliminary injunction restraining Burger King Corporation from exercising its contractual rights to effectuate the termination of each of the thirteen franchise agreements described in Finding 2 above, and therefore Burger King Corporation is not precluded from exercising those contractual rights.

CONCLUSIONS OF LAW

1. By continuing to operate each of the thirteen restaurants described in Finding 2 above as a Burger King licensed restaurant, and by continuing to utilize Burger King Corporation's trademarks and service marks in connection therewith, after Burger King Corporation's May 18, 1979 termination of each of the franchise agreements covering those restaurants, Defendants have breached the contractual obligations imposed on them by the provisions

in each of those franchise agreements which govern the post-termination conduct of the franchisees.

2. By their continued wrongful operation of each of the thirteen restaurants described in Finding 2 above, the Defendants have breached the franchise agreement relating to each restaurant.

3. In order to prevent Defendants from being unjustly enriched by their misconduct, Burger King Corporation is entitled to recover from Defendants the profits which Defendants have derived from their operation of each of Restaurants #545, #597, #606, and #1253 as a Burger King licensed restaurant since May 18, 1979.

4. In light of the evidence presented and applicable legal principles, the Court concludes that Burger King Corporation is entitled to recover from Defendants the amounts specified in the Findings of Fact, as compensatory damages.

5. Defendants have the burden of proof as to each of their affirmative defenses to Burger King Corporation's claims for relief.

6. Defendants have not sustained their burden of proving any affirmative defense to Burger King Corporation's claims for relief.

7. Burger King Corporation is entitled to the entry of a permanent injunction restraining Defendants from using Burger King Corporation's trademarks and service marks in connection with the operation of any restaurant which is not licensed to use those marks.

Based upon the above Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED that Final Judgment is hereby awarded in favor of the Plaintiff, Burger King

Corporation, and against the Defendants, G.A. Mason, D.W. Szabo, R. A. Peterson and W. S. Hardy in the amount of $216,300.00. It is further

ORDERED and ADJUDGED that the Defendants shall be permanently enjoined from using Burger King Corporation's trademarks and service marks in connection with the operation of the thirteen franchisees which are the subject of this Order.

DONE and ORDERED this 25th day of November, 1981.

/s/ Edward B. Davis
United States District Court Judge

Copies Furnished To:

Andrew C. Hall, Esq.
Lee N. Abrams, Esq.
Edward Kaufman, Esq.

FINAL JUDGMENT

(Filed December 16, 1981)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 78-2932-Civ-EBD

BURGER KING CORPORATION, a
Florida corporation,
Plaintiff,

vs.

GERALD A. MASON, et al.,
Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court for trial in June 1980, in August 1981 and in September 1981. Based upon the jury's verdict of August 4, 1980, the jury's verdict of September 2, 1981, the Court's rulings on the various motions of the parties for directed verdicts, the Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, the Court's September 18, 1981 Findings of Fact and Conclusions of Law with respect to BURGER KING CORPORATION's claims for equitable rescission, and the Court's November 25, 1981 Order with respect to BURGER KING CORPORATION's claims for relief based on the allegations of Counts XXXVI-XXXIX of the Amended Second Amended Complaint, and the Court having considered the record herein, the Court does hereby enter this Final Judgment as follows:

IT IS ORDERED, DECREED AND ADJUDGED that:

I. *Final Judgment With Respect to Counts I-IV of the Amended Second Amended Complaint*

1. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY and SZABO the sum of TWO HUNDRED THIRTY-SIX THOUSAND FOUR HUNDRED TWENTY-EIGHT DOLLARS AND TWENTY-EIGHT CENTS ($236,428.28) on Promissory Note No. 102721, together with interest thereon at the rate of twelve percent (12%) per annum from November 1, 1981 until paid, as provided by law.

2. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON and SZABO the sum of ONE HUNDRED SEVENTY-NINE THOUSAND EIGHT HUNDRED NINETY-SIX DOLLARS AND SIXTY-NINE CENTS ($179,896.69) on Promissory Note No. 107727, together with interest thereon at the rate of twelve percent (12%) per annum from November 1, 1981 until paid, as provided by law.

3. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON and SZABO the sum of THREE HUNDRED SIXTY-SIX THOUSAND THREE HUNDRED EIGHTY-ONE DOLLARS AND SEVENTY-SIX CENTS ($366,381.76) on Promissory Note No. 107733,

together with interest thereon at the rate of twelve percent (12%) per annum from November 1, 1981 until paid, as provided by law.

4. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY and SZABO the sum of ONE HUNDRED SEVENTEEN THOUSAND SIX HUNDRED THIRTY-FIVE DOLLARS and SEVENTY-SIX CENTS ($117,635.76) on Promissory Note No. 107734, together with interest thereon at the rate of twelve percent (12%) per annum from November 1, 1981 until paid, as provided by law.

5. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants Mason, HARDY and SZABO the sum of THREE HUNDRED THIRTY-ONE THOUSAND FIVE HUNDRED EIGHTY-TWO DOLLARS AND FIFTY-NINE CENTS ($531,582.59) on Promissory Note No. 107739, together with interest thereon at the rate of twelve percent (12%) per annum from November 1, 1981 until paid, as provided by law.

6. As to the provisions of Paragraphs 1 through 5 of this Final Judgment, execution shall issue as provided by law.

II. *Final Judgment with Respect to Counts V-XXXI of the Amended Second Amended Complaint*

7. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Sum-

mary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO, PETERSON and DAUPHIN FOODS CORP. #1 the sum of ONE THOUSAND NINE HUNDRED TWENTY-EIGHT DOLLARS AND EIGHTY-THREE CENTS ($1,928.83) arising from the operation of Burger King Restaurant #164, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

8. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO, PETERSON and DAUPHIN FOOD CORP. #1 the sum of TWO THOUSAND NINETY-SEVEN DOLLARS AND THIRTY-SIX CENTS ($2,097.36) arising from the operation of Burger King Restaurant #285, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

9. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, ALLISON PARK CORP. #1 and B-K FOODS, INC. the sum of TEN THOUSAND SIX HUNDRED THIRTY-TWO DOLLARS AND FIFTY-EIGHT CENTS ($10,632.58) arising from the operation of Burger King Restaurant #463, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

10. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING

CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON, SMITHFIELD CORP. and B-K FOODS, INC. the sum of ELEVEN THOUSAND SIX HUNDRED FIFTY-FIVE DOLLARS AND FORTY-TWO CENTS ($11,655.42) arising from the operation of Burger King Restaurant #837, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

11. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO, PETERSON and DAUPHIN FOODS CORP. #1 the sum of TWO THOUSAND TWO HUNDRED SEVENTY-ONE DOLLARS AND THIRTY-SIX CENTS ($2,271.36) arising from the operation of Burger King Restaurant #1055, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

12. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, WASHINGTON CORP. #1 and B-K FOODS, INC. the sum of FOUR THOUSAND NINE HUNDRED SEVEN DOLLARS AND SIXTY-FOUR CENTS ($4,907.64) arising from the operation of Burger King Restaurant #1127, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

13. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING

CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, SMITHFIELD CORP. and B-K FOODS, INC. the sum of FOUR THOUSAND ONE HUNDRED FORTY-EIGHT DOLLARS AND TWENTY-THREE CENTS ($4,148.23) arising from the operation of Burger King Restaurant #1201, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

14. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 198 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO and JOHNSTOWN CORP. #2 the sum of FOUR THOUSAND FIFTY-ONE DOLLARS AND ELEVEN CENTS ($4,051.11) arising from the operation of Burger King Restaurant #1253, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

15. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, WASHINGTON CORP. #1 and B-K FOODS, INC. the sum of THREE THOUSAND FOUR HUNDRED TWENTY-ONE DOLLARS AND FIFTY-THREE CENTS ($3,421.53) arising from the operation of Burger King Restaurant #1360, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

16. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON, SMITHFIELD CORP. and B-K FOODS, INC. the sum of SEVEN THOUSAND SEVENTY-FOUR DOLLARS AND SIXTY-NINE CENTS ($7.074.69) arising from the operation of Burger King Restaurant #1689, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

17. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON, SMITHFIELD CORP. and B-K FOODS, INC. the sum of THREE THOUSAND THREE HUNDRED THIRTY-TWO DOLLARS AND FIFTEEN CENTS ($3,332.15) arising from the operation of Burger King Restaurant #1791, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

18. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY and SZABO the sum of FOUR THOUSAND FOUR HUNDRED FORTY-SIX DOLLARS ($4,446.00) arising from the operation of Burger King Restaurant #1802, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

19. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON, SMITHFIELD CORP. and B-K FOODS, INC. the sum of TWENTY THOUSAND EIGHT HUNDRED TWENTY-SEVEN DOLLARS AND FORTY-SIX CENTS ($20,827.46) arising from the operation of Burger King Restaurant #1863, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

20. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON, WASHINGTON CORP. #1 and B-K FOODS, INC. the sum of FIVE THOUSAND FIVE HUNDRED FIFTY-ONE DOLLARS AND SEVENTEEN CENTS ($5,551.17) arising from the operation of Burger King Restaurant #1887, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

21. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON and B-K FOODS, INC. the sum of THREE THOUSAND NINE HUNDRED FIFTY-FIVE DOLLARS AND FIFTY CENTS ($3,955.50) arising from the operation of Burger King Restaurant #2024, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

22. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO and PETERSON the sum of THREE THOUSAND ONE HUNDRED FIFTY-FOUR DOLLARS AND FIFTEEN CENTS ($3,154.15) arising from the operation of Burger King Restaurant #2080, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

23. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, ELKHART No. 1, INC., SOUTH BEND No. 1 INC. the sum of TWO HUNDRED FORTY-TWO THOUSAND THREE HUNDRED SEVENTY-ONE DOLLARS AND NINETY-EIGHT CENTS ($242,371.98) arising from the operation of Burger King Restaurant #583, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

24. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SOUTH BEND No. 1, INC., the sum of TWO HUNDRED TWENTY-TWO THOUSAND EIGHTY DOLLARS AND ONE CENT ($222,080.01) arising from the operation of Burger King Restaurant #302, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

25. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SOUTH BEND No. 1, INC. the sum of ONE HUNDRED EIGHTEEN THOUSAND SIX HUNDRED, TWENTY-THREE DOLLARS AND SEVENTY-FOUR CENTS ($118,623.74) arising from the operation of Burger King Restaurant #1358, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

26. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO and JOHNSTOWN CORP. #1 the sum of SEVEN THOUSAND EIGHT HUNDRED FORTY-SEVEN DOLLARS AND EIGHTY-SEVEN CENTS ($7,847.87) arising from the operation of Burger King Restaurant #597, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

27. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO and STATE COLLEGE, PA., No. 1, INC. the sum of NINE THOUSAND THREE HUNDRED TWENTY-NINE DOLLARS AND SIXTY-FIVE CENTS ($9,329.65) arising from the operation of Burger King Restaurant #606, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

28. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO and PETERSON the sum of ONE HUNDRED THOUSAND SEVEN HUNDRED FIVE DOLLARS AND TWENTY-SEVEN CENTS ($100,705.27) arising from the operation of Burger King Restaurant #1382, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

29. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment. BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, LAFAYETTE CORPORATION No. 2 and HARDY ENTERPRISES, INC. the sum of FIFTEEN THOUSAND EIGHT HUNDRED FORTY-THREE DOLLARS AND SIXTY-NINE CENTS ($15,843.69) arising from the operation of Burger King Restaurant #545, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

30. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment. BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, LAFAYETTE CORPORATION No. 1 and HARDY ENTERPRISES, INC. the sum of ELEVEN THOUSAND SEVEN HUNDRED NINETY-FOUR DOLLARS AND THIRTY-THREE CENTS ($11,794.33) arising from the operation of Burger King Restaurant #473, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

31. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY and HARDY ENTERPRISES, INC. the sum of ONE THOUSAND EIGHT HUNDRED SEVENTY-FOUR DOLLARS AND SIXTY-THREE CENTS ($1,874.63) arising from the operation of Burger King Restaurant #1091, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

32. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON and B-K FOODS, INC. the sum of FOUR THOUSAND SEVENTY-SIX DOLLARS AND SEVENTY CENTS ($4,076.70) arising from the operation of Burger King Restaurant #2249, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

33. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, Plaintiff BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON and B-K FOODS, INC. the sum of TWO THOUSAND FIVE HUNDRED FORTY-FOUR DOLLARS AND SIXTY-ONE CENTS ($2,544.61) arising from the operation of Burger King Restaurant #2247, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

34. By reason of the August 4, 1980 jury verdict and this Court's May 20, 1981 Order granting BURGER KING CORPORATION's March 16, 1981 Motion for Partial Summary Judgment, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY, SZABO, PETERSON and B-K FOODS, INC. the sum of TWO THOUSAND SEVENTY-FOUR DOLLARS AND FORTY-NINE CENTS ($2,074.49) arising from purchases of materials and supplies for use in the operation of Defendants' Pennsylvania Burger King restaurants, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

35. As to the provisions of Paragraphs 7 through 34 of this Final Judgment, execution shall issue as provided by law.

III. *Final Judgment With Respect to Count XXXII of the Amended Second Amended Complaint*

36. On August 4, 1980, the jury found that BURGER KING CORPORATION had properly terminated the December 28, 1976 Pittsburgh Development Agreement; by reason of that jury verdict, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants MASON, HARDY, SZABO and PETERSON on BURGER KING CORPORATION's claim that it properly terminated that Development Agreement.

37. On August 4, 1980, the jury found that BURGER KING CORPORATION had properly terminated the December 28, 1976 Kansas City Development Agreement; by reason of that jury verdict, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants MASON, HARDY and SZABO on BURGER KING CORPORATION's claim that it properly terminated that Development Agreement.

IV. *Final Judgment With Respect To Counts XXXIII and XXXVI-XXXIX of the Amended Second Amended Complaint*

38. On September 2, 1981, the jury found that on May 18, 1979, BURGER KING CORPORATION properly terminated the franchise agreements pursuant to which Defendants had been licensed to operate each of Restaurants #164, #285, #1055, #597, #606 and #1253 as a Burger King licensed restaurant, and to use BURGER KING CORPORATION's trademarks and service marks in connection therewith; by reason of that jury verdict, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on BURGER KING CORPORATION's claim that it properly terminated those franchise agreements.

39. In its Order of September 4, 1981, as subsequently amended, this Court found that on May 18, 1979, BURGER KING CORPORATION properly terminated the franchise agreements pursuant to which Defendants had been licensed to operate each of Restaurants #302, #583, #1358, #473, #545, #1091 and #1382 as a Burger King licensed restaurant, and to use BURGER KING CORPORATION's trademarks and service marks in connection therewith; by reason of that Order, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on BURGER KING CORPORATION's claim that it properly terminated those franchise agreements.

40. On August 4, 1980, the jury found that on May 18, 1979, BURGER KING CORPORATION improperly terminated the franchise agreements covering Restaurants #463, #837, #1127, #1201, #1360, #1689, #1791, #1863, #1887, #2024, #2247 and #2249; by reason of that jury verdict, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on

BURGER KING CORPORATION's claim that it properly terminated those franchise agreements.

41. On September 2, 1981, the jury found that on May 18, 1979, BURGER KING CORPORATION improperly terminated the franchise agreement covering Restaurant #2080; by reason of that jury verdict, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on BURGER KING CORPORATION's claim that it properly terminated that franchise agreement.

42. On August 4, 1980, this Court granted Defendants' motion to dismiss BURGER KING CORPORATION's claim that Defendants violated the Lanham Act, 15 U.S.C. § 1051 *et seq.*, by continuing to use BURGER KING CORPORATION's trademarks and service marks in connection with their operation, following May 18, 1979, of the restaurants enumerated in Paragraphs 38-41 above; by reason of that determination, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on the Lanham Act claims which BURGER KING CORPORATION asserted in Count XXXIII of the Amended Second Amended Complaint.

43. By reason of this Court's November 25, 1981 Order, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO, HARDY and JOHNSTOWN CORP. #1 the sum of $122,500, by which amount of adjusted net profits those Defendants have been unjustly enriched by reason of their continued operation of Restaurant #597 in Johnstown, Pennsylvania, as a Burger King licensed restaurant after May 18, 1979, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

44. By reason of this Court's November 25, 1981 Order, BURGER KING CORPORATION shall recover of Defen-

dants MASON, SZABO, HARDY and STATE COLLEGE, PA., No. 1, INC. the sum of $6,600, by which amount of adjusted net profits those Defendants have been unjustly enriched by reason of their continued operation of Restaurant #606 in State College, Pennsylvania, as a Burger King licensed restaurant after May 18, 1979, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

45. By reason of this Court's November 25, 1981 Order, BURGER KING CORPORATION shall recover of Defendants MASON, SZABO, HARDY and JOHNSTOWN CORP. #2 the sum of $70,900, by which amount of adjusted net profits those Defendants have been unjustly enriched by reason of their continued operation of Restaurant #1253 in Johnstown, Pennsylvania, as a Burger King licensed restaurant after May 18, 1979, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

46. By reason of this Court's November 25, 1981 Order, BURGER KING CORPORATION shall recover of Defendants MASON, HARDY and HARDY ENTERPRISES, INC. the sum of $16,300, by which amount of adjusted net profits those Defendants have been unjustly enriched by reason of their continued operation of Restaurant #545 in Lafayette, Indiana, as a Burger King licensed restaurant after May 18, 1979, together with interest thereon at the rate of twelve percent (12%) per annum from and after the date hereof, as provided by law.

47. As to the provisions of Paragraphs 43 through 46 of this Final Judgment, execution shall issue as provided by law.

48. The amounts specified in Paragraphs 43-46 above constitute the amounts of adjusted net profits by which

Defendants have been unjustly enriched by reason of their continued post-termination operation of certain restaurants as Burger King licensed restaurants through July 31, 1981. BURGER KING CORPORATION also shall recover from Defendants the amounts of adjusted net profits by which Defendants have been unjustly enriched by reason of their continued operation of restaurants as Burger King licensed restaurants after July 31, 1981, and this Court reserves jurisdiction to determine those additional amounts on the basis of affidavits to be submitted by the parties.

49. By its Order of November 25, 1981, this Court determined that BURGER KING CORPORATION is not entitled to recover any amount on its claim that Defendants have been unjustly enriched because they retained and used the amounts specified in Paragraphs 43-46 above; by reason of that Order, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on BURGER KING CORPORATION's claim for recovery of the value of the benefits which Defendants realized from their retention and use of those amounts.

50. In its Order of November 25, 1981, this Court found that BURGER KING CORPORATION had failed to sustain its burden of proving its claims for compensatory damages based on alleged injury to its reputation, and to its development and/or marketing activities, resulting from Defendants' continued operation of each of Restaurants #302, #583 and #1358 in South Bend/Elkhart, Indiana as a Burger King licensed restaurant after May 18, 1979; by reason of that Order, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on those claims.

51. In its Order of November 25, 1981, this Court found that BURGER KING CORPORATION had failed to

sustain its burden of proving its claims for compensatory damages based on alleged injury to its reputation, and to its development and/or marketing activities, resulting from Defendants' continued operation of each of Restaurants #473, #545 and #1091 in Lafayette, Indiana as a Burger King licensed restaurant after May 18, 1979; by reason of that Order, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on those claims.

52. In its Order of November 25, 1981, this Court found that BURGER KING CORPORATION had failed to sustain its burden of proving its claims for compensatory damages based on alleged injury to its reputation, and to its marketing activities, resulting from Defendants' continued operation of each of Restaurants #164, #285 and #1055 in the Harrisburg, Pennsylvania area as a Burger King licensed restaurant after May 18, 1979; by reason of that Order, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on those claims.

53. By reason of this Court's November 25, 1981 Order, Defendants are permanently enjoined from using BURGER KING CORPORATION's trademarks and service marks in connection with the operation of Restaurants #164, #285, #1055, #597, #606, #1253, #302, #583, #1358, #473, #545, #1091 or #1382, from identifying themselves publicly as existing or former Burger King franchisees at the location of any of those restaurants, and from using any of BURGER KING CORPORATION's trade secrets, signs, symbols, devices, recipes, formulas, food mixes or other materials constituting part of the Burger King System at the location of any of those restaurants. Defendants also are directed to comply with the provisions in each of the franchise agreements covering Restaurants

#164, #285, #1055, #597, #606, #1253, #302, #583, #1358, #473, #545, #1091 and #1382 which govern the post-termination conduct and obligations of a former franchisee. This Court reserves jurisdiction to determine the additional amounts which BURGER KING CORPORATION shall recover from Defendants for royalties, rent, advertising fund contributions and purchases of materials and supplies from BURGER KING CORPORATION for the operation of any of Restaurants #164, #285, #1055, #597, #606, #1253, #302, #583, #1358, #473, #545, #1091 or #1382 as a Burger King licensed restaurant during the period between November 1, 1981 and the date on which Defendants comply with the provisions of this Paragraph.

54. By reason of this Court's November 25, 1981 Order, Defendants are permanently enjoined from using BURGER KING CORPORATION's trademarks and service marks in connection with the operation of any restaurant which is not licensed to use those marks, from identifying themselves publicly as existing or former Burger King franchisees at the location of any restaurant which is not licensed to use those marks, and from using any of BURGER KING CORPORATION's trade secrets, signs, symbols, devices, recipes, formulas, food mixes or other materials constituting part of the Burger King system at the location of any restaurant which is not licensed to do so.

V. *Final Judgment With Respect to Count XXXIV of the Amended Second Amended Complaint*

55. On August 4, 1980, the jury found that BURGER KING CORPORATION had failed to establish that any of the Defendants conspired to defraud it; by reason of that jury verdict, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORA-

TION on the claims which BURGER KING CORPORATION asserted in Count XXXIV of the Amended Second Amended Complaint.

VI. *Count XXXV of the Amended Second Amended Complaint*

56. BURGER KING CORPORATION has asserted certain claims for attorneys' fees and related expenses. The amount to be awarded to BURGER KING CORPORATION on its claims for attorneys' fees and related expenses will be determined after the forthcoming evidentiary hearing with respect thereto, and this Court reserves jurisdiction to dispose of that matter.

VII. *Final Judgment With Respect to Count XXXX of the Amended Second Amended Complaint*

57. In its September 18, 1981 Findings of Fact and Conclusions of Law, this Court determined that BURGER KING CORPORATION had failed to establish that it is entitled to the rescissionary relief which it sought in Count XXXX of the Amended Second Amended Complaint; by reason of those Findings and Conclusions, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on its claim for equitable rescission of the franchise agreements covering Restaurants #1253, #1802 and #2080.

58. Prior to the commencement of the September 3, 1981 bench trial on the rescission issues, BURGER KING CORPORATION withdrew its claims for equitable rescission of the franchise agreements covering Restaurants #1091, #1358 and #1382; accordingly, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION on those claims.

VIII. *Final Judgment With Respect to the Second Amended Counterclaim*

59. On August 4, 1980, the jury found that BURGER KING CORPORATION had properly terminated the December 28, 1976 Pittsburgh Development Agreement; by reason of that jury verdict, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION terminated that Development Agreement improperly (which claim was asserted in Counts I and II of the Second Amended Counterclaim).

60. On August 4, 1980, the jury found that on May 18, 1979, BURGER KING CORPORATION improperly terminated the franchise agreements covering Defendants' twelve restaurants in the Pittsburgh, Pennsylvania area (Restaurants #463, #837, #1127, #1201, #1360, #1689, #1791, #1863, #1887, #2024, #2247 and #2249); by reason of that jury verdict, judgment is hereby entered in favor of Defendants and against BURGER KING CORPORATION with respect to Defendants' claim that BURGER KING CORPORATION terminated those franchise agreements improperly. However, the only substantive relief which Defendants sought with respect to the termination of those twelve franchise agreements was reinstatement of the franchise agreements, which relief has effectively been granted to them; consequently, Defendants are not entitled to any further relief on their claim that BURGER KING CORPORATION terminated those twelve franchise agreements improperly (which claim was asserted in Counts I and II of the Second Amended Counterclaim).

61. After all of the evidence had been presented during the 1980 jury trial, Defendants withdrew Count III of the Second Amended Counterclaim; accordingly, judgment

is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION maliciously interfered with Defendants' business relationships with the customers of their Pittsburgh area restaurants (which claim was asserted in Count III of the Second Amended Counterclaim).

62. In its ruling during the 1980 jury trial granting BURGER KING CORPORATION's motion for a directed verdict with respect to the allegations of Count IV of the Second Amended Counterclaim, this Court determined that in its capacity as franchisor and licensor of its trademarks and service marks, BURGER KING CORPORATION does not owe a fiduciary duty to any of the Defendants; by reason of that ruling, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION breached a fiduciary duty which it owed to Defendants (which claim was asserted in Count IV of the Second Amended Counterclaim).

63. By reason of the August 4, 1980 findings of the jury and this Court's ruling granting BURGER KING CORPORATION's motion for a directed verdict with respect to certain of the allegations of Count VIII of the Second Amended Counterclaim, it has been determined that Defendants failed to establish that BURGER KING CORPORATION induced them by misrepresentation or by the exercise of economic coercion to enter into (a) certain agreements relating to the development and operation of Burger King licensed restaurants in the Oklahoma City and Kansas City areas (including the December 28, 1976 Kansas City Development Agreement), or (b) the five December 28, 1976 Promissory Notes (i.e., Notes Nos. 102721, 107727, 107733, 107734 and 107739). By reason

of the August 4, 1980 findings of the jury and this Court's ruling granting BURGER KING CORPORATION's motion for a directed verdict with respect to certain of the allegations of Count VIII of the Second Amended Counterclaim, it also has been determined that Defendants failed to establish that BURGER KING CORPORATION had breached any other agreements which related to Defendants' operation of Burger King licensed restaurants in Oklahoma City or to Defendants' development rights in the Kansas City or Oklahoma City areas. Furthermore, on August 4, 1980, the jury found that BURGER KING CORPORATION had properly terminated the December 28, 1976 Kansas City Development Agreement, and that Defendants failed to establish that BURGER KING CORPORATION had improperly terminated that Development Agreement. By reason of those determinations, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on the claims which Defendants asserted in Count VIII of the Second Amended Counterclaim, as amended.

64. On August 4, 1980, the jury found that Defendants had failed to establish that BURGER KING CORPORATION had breached an agreement which, according to Defendants, gave them the exclusive right to develop additional Burger King restaurants in the Harrisburg, Pennsylvania area; by reason of that jury verdict, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION breached an agreement which purportedly gave them exclusive development rights in that area (which claim was asserted in Count IX of the Second Amended Counterclaim).

65. In its ruling during the 1980 jury trial granting BURGER KING CORPORATION's motion for a directed

verdict with respect to the allegations of Count X of the Second Amended Counterclaim, this Court found that Defendants had failed to establish that BURGER KING CORPORATION had breached the provision in the franchise agreement covering Restaurant #164 in Harrisburg, Pennsylvania which gave Defendants MASON, SZABO and PETERSON (and their subsequent assignee DAUPHIN FOODS CORP. #1) a limited option to renew their rights under that franchise agreement for an additional 15 year period; by reason of that ruling, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION breached that provision (which claim was asserted in Count X of the Second Amended Counterclaim).

66. In its ruling during the 1980 jury trial granting BURGER KING CORPORATION's motion for a directed verdict with respect to the allegations of Count XI of the Second Amended Counterclaim, this Court found that Defendants had failed to establish that BURGER KING CORPORATION had breached an agreement which, according to Defendants, gave them the exclusive right to develop additional Burger King resaturants in the Johnstown, Pennsylvania area; by reason of that ruling, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION breached an agreement which purportedly gave them exclusive development rights in that area (which claim was asserted in Count XI of the Second Amended Counterclaim).

67. In its ruling during the 1980 jury trial granting BURGER KING CORPORATION's motion for a directed verdict with respect to the allegations of Count XII of the Second Amended Counterclaim, this Court found that

Defendants had failed to establish that BURGER KING CORPORATION had breached an agreement which, according to Defendants, gave them the exclusive right to develop additional Burger King restaurants in the South Bend/Elkhart, Indiana area; by reason of that ruling, judgment is hereby entered in favor of BURGER KING CORPORATION and against Defendants on Defendants' claim that BURGER KING CORPORATION breached an agreement which purportedly gave them exclusive development rights in that area (which claim was asserted in Count XII of the Second Amended Counterclaim).

IX. *Miscellaneous*

68. The entry of this Final Judgment is without prejudice to any party's right to appeal from any of the various Orders, not expressly referred to herein, which this Court entered during the period between August 4, 1980 (the conclusion of the first jury trial) and September 2, 1981 (the conclusion of the second jury trial), and or from any of this Court's evidentiary rulings, and/or from any of this Court's other orders or rulings (including but not limited to those relating to such matters as jury instructions and motions to amend pleadings or withdraw claims).

69. The topic headings included in this Final Judgment are merely for purposes of organizational structure, and are not intended to have any substantive force or effect.

Done and Ordered in Chambers, Dade County, Miami, Florida, this 16th day of December, 1981.

/s/ Edward B. Davis
Edward B. Davis
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Filed April 5, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION, a
Florida corporation,
Plaintiff,

-vs-

GERALD A. MASON, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER has come before the Court on the motion of the Plaintiff, Burger King Corporation, for an award of attorneys' fees and costs in connection with certain portions of this case. Specifically, the Plaintiff seeks an award of attorneys' fees and costs for the following:

1. The judgment it obtained on the five December 28, 1976 Promissory Notes;

2. The judgment it obtained for past due rent on property leased to the defendants by Burger King;

3. An adjudication which upheld its termination of the December 28, 1976 Pittsburgh and Kansas City Development Agreements; and

4. Its success in prevailing on Counts III, V, VI, VII and X of the defendants Second Amended Counterclaim.

A contractual agreement is asserted as the basis for an award of attorneys' fees and costs as to claims 1, 2, and 3. Section 57.105, Florida Statutes, is asserted as the basis for an award under claim 4.

On February 2 and 3, 1982, a bench trial was conducted on the issues raised in connection with the motion for an award of attorneys' fees and costs. Based upon the evidence presented at trial, in light of the entire record in this case and the Court's familiarity with the litigation, the Court does make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff, Burger King Corporation (hereinafter Burger King) was represented in this case by two law firms, those firms being Mayer, Brown and Platt of Chicago, Illinois and Hall & Hauser of Miami, Florida.

2. On December 28, 1976, Defendants executed five Promissory Notes. Four of the five Promissory Notes contained the following identical language:

> Each maker and endorser agrees, jointly and severally, to pay all costs of collection, including a reasonable attorneys' fee, if this note, including any installment payment, is not paid promptly when due, and same is given to an attorney for collection, whether suit be brought or not.

3. The fifth Promissory Note which the defendants executed on December 28, 1976 contained the following language:

> In the event it becomes necessary to collect this Note through an attorney, the makers hereof hereby agree to pay all the costs of collection, including a reasonable attorney's fee * * *.

4. The Defendants executed nine lease agreements pursuant to which the Defendants leased properties from Burger King. Seven of those nine lease agreements provide that:

> In the event of default by Lessee, it will pay Lessor [BURGER KING CORPORATION] reasonable attorneys' fees paid or incurred by said Lessor enforcing Lessee's covenants and agreements, any of them, herein contained, including proceedings to collect rent, or to evict Lessee.

5. The other two lease agreements provided that:

> If any legal action is instituted to enforce this Lease or any part thereof the prevailing parties shall be entitled to recover reasonable attorneys' fees and court costs.

6. By reason of the verdict entered by the first jury in this cause, this Court's Order of October 31, 1980 and this Court's Order of May 20, 1981, Burger King has prevailed upon its claims for monies due under the December 28, 1976 Promissory Notes and the nine lease agreements.

7. On December 28, 1976, the parties executed two development agreements, one relating to the Pittsburgh area and one relating to the Kansas City area. Each of those development agreements obligated the named Developers to "indemnify and reimburse" Burger King for any costs and attorneys' fees incurred in successfully defending any litigated claim that it had terminated the development agreements improperly. The specific language of this provision is as follows:

> In the event Developers dispute BURGER KING CORPORATION's termination of this Agreement and

legal action is commenced, Developers shall indemnify and reimburse BURGER KING CORPORATION for costs and attorneys' fees in successfully defending such action.

8. The "Developers" named in the December 28, 1976 Pittsburgh Development Agreement were the Defendants Mason, Hardy, Szabo and Peterson. The "Developers" named in the December 28, 1976 Kansas City Development Agreement were the Defendants Mason, Hardy and Szabo.

9. Burger King terminated the Pittsburgh Development Agreement on September 1, 1977. Burger King terminated the Kansas City Development Agreement on December 15, 1977.

10. The Defendants vigorously disputed the termination of the Development Agreements. On several occasions, Defendants' counsel threatened Burger King that suit would be filed challenging the termination of those Development Agreements.

11. On July 5, 1978 Burger King filed its complaint against the Defendants. Count XXXII of this complaint asserted that the Development Agreements had been properly terminated. The Defendants denied this claim and filed a counterclaim asserting that the Development Agreements had been terminated improperly. In this Counterclaim the Defendants sought injunctive and monetary relief.

12. By reason of the judgment entered in accordance with the jury verdict at the conclusion of the first trial, Burger King has prevailed upon its claim for a declaration that the Pittsburgh and Kansas City Development Agreements were properly terminated. Correspondingly, Burger King was successful in defending against the Counterclaim which asserted improper termination.

13. Burger King has prevailed upon Counts III, V, VI and VIII of the Second Amended Counterclaim by reason of the Defendant's voluntary dismissal of these claims.

14. Burger King has prevailed upon Count X of the Second Amended Counterclaim by reason of the directed verdict entered by this Court during the first jury trial.

15. There are certain claims asserted by Burger King upon which it did not prevail. Those claims included claims for fraud and rescission of certain franchise agreements. Burger King neither has nor claims any right to recover Attorneys' fees regarding any of these claims.

16. Burger King's agreement with the Mayer, Brown and Platt law firm provided that Mayer, Brown and Platt would bill Burger King on an interim basis for amounts to be determined by the lead counsel responsible for this litigation, Lee N. Abrams, on the basis of his evaluation of the work performed for those services.

17. Burger King's agreement with the Hall & Hauser firm provided that Hall & Hauser would bill Burger King at a fixed hourly rate on an interim basis. Initially, the hourly rate agreed upon was $85. per hour for partners and $50. per hour for associates. The agreement was modified in December, 1980 to incorporate higher hourly rates, those rates being $100. per hour for partners and $65. per hour for associates. The hourly rate for law clerks was between $25. and $35. per hour. Paralegals were billed at $35. per hour.

18. As of February 2, 1982, Burger King has paid the firm of Mayer, Brown & Platt $891,100. in fees and approximately $39,000. in costs. As of this date, Burger King has paid the firm of Hall and Hauser $410,260. in fees and approximately $103,000. in costs.

19. This litigation was complex and protracted. It presented a number of novel and difficult questions encompassing both factual and legal issues. In order to be properly represented, it was necessary for Burger King to retain the services of skilled counsel. The law firms of Mayer, Brown & Platt and Hall & Hauser P.A. rendered legal services commensurate with this standard.

20. Burger King, through the legal services rendered by its retained counsel, was successful in obtaining favorable results on many of the issues raised in this case. Specifically, it prevailed on the four claims which are the subject of this motion for an award of attorneys' fees and costs.

21. Acceptance of employment in this case precluded counsel for Burger King from accepting other employment. Burger King was aware of that fact when it retained the law firms of Mayer, Brown and Platt and Hall and Hauser, P.A.

22. This case involved substantial time and labor; counsel expended the following amounts of time on this case:

Mayer, Brown & Platt	
Lee N. Abrams	2,772.75 Hours
Other Partners	17.75
T. Mark McLaughlin	3,252.75
Other Associates	645.00
Law Clerks	419.75
Paralegals	3,912.00
Hall and Hauser, P.A.	
Andrew C. Hall	3,145.00
James A. Hauser	265.00
Senior Associates	907.00
Junior Associates	463.00
Law Clerks	661.25
Paralegals	377.50

23. Burger King's attorneys failed to maintain their time records in a fashion which would facilitate an easy delineation by the Court between fees attributable to compensable and non-compensable matters. This necessarily leads to a certain imprecision in the Court's allocation.

24. The fees charged by Burger King's counsel were reasonable in light of the fees customarily charged in this community for similar legal services.

25. Burger King's counsel worked on both issues for which attorneys' fees can properly be awarded and on other non-compensable issues. The fees and disbursements which Burger King has paid must be allocated among the various issues in the case. While no mathematically precise allocation can be made because of the overlapping of issues and the absence of specific detailed records, the Court is still in a position to make a competent and reasonable allocation. Such an allocation is as follows:

Termination of Development Agreements	45%
Recovery on Promissory Notes and Leases	20%
Successful defense of claims to which *Fla. Stat.* §57.105 is applicable	3%

26. The percentage allocation in the above finding is based upon the evidence presented at trial and the Court's own familiarity with the case. These percentages are applicable to the services rendered and the fees charged by both Mayer, Brown and Platt and Hall and Hauser, P.A.

27. Burger King paid $9,424.51 directly to the court reporter for the transcript of the 1980 jury trial. Eighty-five percent of this cost was related to compensable issues.

28. The defendants have not established that any of the work performed by counsel for Burger King was excessive.

CONCLUSIONS OF LAW

1. Under Florida law, a party is limited to the amount actually paid, or a reasonable fee, whichever is less, in a claim for an award of attorneys' fees. *Trustee of Cameron Brown Investment Group v. Tavormina,* 385 So.2d 728 (Fla. 3d DCA 1980)

2. Burger King, as the party seeking to recover attorneys' fees, has the burden of establishing, by competent evidence, the amount of attorneys' fees incurred relating to compensable matters. *United Services Automobile Association v. Kiibler,* 364 So.2d 57 (Fla. 3d DCA 1978)

3. Burger King may not recover an amount greater than the amount of attorneys' fees which it actually paid its counsel. *Trustee of Cameron Brown Investment Group v. Tavormina,* 385 So.2d 728 (Fla. 3rd DCA 1980).

4. Burger King is entitled to recover attorneys' fees for that portion of the case which related to the Development Agreement termination.

5. Burger King is entitled to recover attorneys' fees for that portion of the case which related to the promissory notes and lease agreements.

6. Burger King is not entitled to recover any attorneys' fees incurred in connection with issues involved in individual franchise terminations.

7. Burger King is not entitled to recover any attorneys' fees incurred in connection with the conspiracy to defraud issue.

8. Burger King is not entitled to recover attorneys' fees in connection with the issues raised in Counts V and VI of the Defendants' Second Amended Counterclaim. Section 57.105, Florida Statutes, does not apply to federal antitrust claims asserted in Federal Court. *See generally, Sargent v. Genesco, Inc.*, 337 F.Supp. 1244 (M.D. 1972).

9. Burger King is entitled to recover attorneys' fees under Section 57.105, Florida Statutes, in connection with Counts III, VII and X of the Defendants' Second Amended Counterclaim.

10. Burger King is entitled to recover the costs of this litigation insofar as they relate to compensable issues. The allocation of costs between compensable and non-compensable issues shall be in the same percentages as those applied to attorneys' fees.

11. Burger King is entitled to recover 85% of the cost of the transcript for the first jury trial.

12. Attorneys' fees for the services of in-house counsel are not recoverable. There is no precedent in Florida law for an award of attorneys' fees for the services of in-house counsel. Cases from other jurisdictions awarding fees for the services of in-house counsel who actively tried the case are not factually similar to this case where in-house counsel acted primarily as a liaison between the client and outside counsel who had complete responsibility for the conduct of the case.

13. Burger King is entitled to recover attorneys' fees and costs in the following amounts:

Termination of Development	Fees	Costs
Agreements (45%)	$585,612.00	$63,900.00
Recovery on Promissory Notes and Leases (20%)	$260,272.00	$18,400.00
Successful defense of claims to which Fla. Stat. §57.105 is applicable (3%)	$39,040.80	$4,260.00
Transcript of First Jury Trial (85%)		$8,010.83

DONE and ORDERED this 5th day of April, 1982.

/s/ Edward B. Davis
United States District Court Judge

Copies to counsel of record

FINAL JUDGMENT IN FAVOR OF BURGER KING CORPORATION AND AGAINST DEFENDANTS ON ATTORNEY'S FEES AND EXPENSES

(Filed June 3, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 78-2932-Civ-EBD

BURGER KING CORPORATION,
Plaintiff,

vs.

GERALD A. MASON, et al.,
Defendant.

FINAL JUDGMENT IN FAVOR OF BURGER KING CORPORATION AND AGAINST DEFENDANTS ON ATTORNEY'S FEES AND EXPENSES

THIS CAUSE came before the Court for trial on February 2 and February 3, 1982 on the Motion of the Plaintiff, BURGER KING CORPORATION for an award of attorney's fees and expenses in connection with certain claims which were the subject of this Court's December 16, 1981 Final Judgment. On the evidence presented, this Court entered the findings of fact and conclusions of law on April 5, 1982. Upon these findings of fact, this Court does hereby enter this its Final Judgment for attorneys' fees and expenses in favor of BURGER KING CORPORATION and against the Defendants as indicated below.

Therefore, it is

ORDERED and ADJUDGED that Judgment be entered in favor of Burger King Corporation and against the following Defendants in the following amounts for which let execution issue as provided by law:

1. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against Defendant GERALD A. MASON in the amount of $979,495.63, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

2. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against Defendant DONALD W. SZABO in the amount of $934,623.97, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

3. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against Defendant WESLEY A. HARDY in the amount of $892,486.72, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

4. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against Defendant RICHARD D. PETERSON in the amount of $378,395.10, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

5. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against Defendant HARDY ENTERPRISES, INC. in the amount of $55,224.69, together with interest thereon at the rate

of 12% per annum as provided by law, for which let execution issue.

6. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against SMITHFIELD CORPORATION in the amount of $53,639.10, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

7. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against LAFAYETTE CORPORATION NO. 1 in the amount of $52,756.60, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

8. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against LAFAYETTE CORPORATION NO. 2 in the amount of $53,779.72, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

9. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against ELKHART, INC. in the amount of $74,431.15, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

10. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against SOUTH BEND #1, INC. in the amount of $92,270.23, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

11. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against

B.K. FOODS, INC. in the amount of $53,997.92, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

12. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION and against STATE COLLEGE, PA. # 1, INC. in the amount of $51,801.37, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

13. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION against JOHNSTOWN CORP. #1 in the amount of $51,748.03, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

14. A Final Judgment is hereby awarded in favor of Plaintiff BURGER KING CORPORATION against ALLISON PARK #1, INC. in the amount of $51,675.30, together with interest thereon at the rate of 12% per annum as provided by law, for which let execution issue.

DONE AND ORDERED this 3rd day of June, 1982 in Chambers, Miami, Dade County, Florida.

/s/ Edward B. Davis
United States District Judge

Copies Furnished to:

Edward Kaufman, Esq.
Andrew C. Hall, Esq.

2583e272.mot

I. BREAKDOWN OF DEVELOPMENT AGREEMENT AWARD

FEES	COSTS	AWARD
$585,612.00	$63,900.00	$649,512.00

I. TERMINATION OF DEVELOPMENT AGREEMENTS

1/2 to P.D.A.	$324,756.00
1/2 to K.C.D.A.	$324,756.00

A. AWARD AGAINST DEVELOPERS NAMED IN BOTH AGREEMENTS

(Mason, Hardy & Szabo)	$649,512.00

B. AWARD AGAINST DEVELOPER NAMED ONLY IN PITTSBURGH DEVELOPMENT AGREEMENT

(Peterson)	$324,756.00

II. BREAKDOWN OF AWARD ON PROMISSORY NOTES AND LEASES

Promissory Notes - Judgment of (principal only)	$1,101,971.60
Leases - Judgment of	232,057.57
TOTAL	$1,334,029.17

NOTES = 82.6% of total
LEASES = 17.4% of total

	FEES	COSTS	TOTAL
AWARD FOR RECOVERY OF NOTES AND LEASES	$260,272.00	$18,400.00	$278,672.00
AWARD FOR NOTES	$278,672 x 82.6%	=	$230,183.07
AWARD FOR LEASES	$278,672 x 17.4%	=	48,488.93

A

NOTES:

		AWARD
		$230,183.07
1.	Award as to Defendants on all five notes	$230,183.07
2.	Award as to Defendant Hardy (executed three notes only) (see calculation below)	$143,173.86

Hardy Notes $685,646.63 / All Notes $1,101,971.60 = 62.2%

62.2% of $230,183.07 = $143,173.86

B

Leases:

Award $48,488.93

Award as to Defendants on all nine leases (Mason and Hardy) $48,488.93

Award as to remainder of Defendants on all leases

Rect. No.	Past Due Rent (principal only)	SZABO	PETERSON	HARDY ENTERPRISES	SMITHFIELD CORP.	LAFAYETTE CORP.	BK FOODS	STATE COLLEGE PA	ELKHART NO. 1	LAFAYETTE NO. 2	SOUTHBEND NO. 1	JOHNSTOWN NO. 1	ALLISON PARK NO. 1
1. 302	$85,372.50										x		
2. 583	110,643.50								x		x		
3. 1863	7,022.75	x	x		x		x						
4. 597	2,099.00	x										x	
5. 606	2,335.11	x						x					
6. 463	1,730.00	x					x						x
7. 473	6,904.68			x		x							
8. 545	11,816.75			x						x			
9. 837	4,113.28	x	x		x		x						

1.	Stein	Rent	$17,301.14 (L. 3, 4, 5, 6 & 9)	
		Total	$232,057.57	= 7.46% x $48,488.93 = $3,617.27
2.	Peterson	Rent	$11,136.03 (L. 3 & 9)	
		Total	$232,057.57	= 4.8% x $48,488.93 = $2,327.47
3.	Hardy Enterprises	Rent	$18,721.43 (L. 7 & 8)	
		Total	$232,057.57	= 8.07% x 48,488.93 = $3,913.06
4.	Smithfield Corp.	Rent	$11,136.03 (L.3 & 9)	
		Total	$232,057.57	= 4.8% x $48,488.93 = $2,327.47
5.	Lafayette No. 1	Rent	$6,904.68 (L. 7)	
		Total	$232,057.57	= 2.98% x $48,488.93 = $1,444.97
6.	Lafayette No. 2	Rent	$11,816.75 (L. 8)	
		Total	$232,057.57	= 5.09% x $48,488.93 = $2,468.09
7.	Elkhart No. 1	Rent	$110,643.50 (L. 2)	
		Total	$232,057.57	= 47.68% x $48,488.93 [illegible]
8.	Southbend No. 1	Rent	$196,016.00 (L. 1 & 2)	
		Total	$232,057.57	= 84.47% x $48,488.93 = $40,958.60
9.	BK Foods	Rent	$12,866.03 (L. 3, 6 and 9)	
		Total	$232,057.57	= 5.54% x $48,488.93 = $2,686.29
10.	State College PA	Rent	$2,335.11 (L.5)	
		Total	$23,057.57	= 1.01% x $48,883.93 = $489.74
11.	Johnstown No. 1	Rent	$2,099.00 (L. 4)	
		Total	$232,057.57	= .90% x $436.40 = $436.40
12.	Allison Park 1	Rent	$1,730.00 (L. 6)	
		Total	$232,057.57	= .75% x $48,488.93 = $363.67

III. Fla. Stat. §57.105

	FEES	COSTS	TOTAL
All Counter-Plaintiffs	$39,040.80	$4,260.00	$43,300.80

IV. TRANSCRIPT

All Defendants	$8,010.83

RECAP

1. MILON	Development Agreements	$649,512.00
	Notes	$230,183.07
	Leases	48,488.93
	¶57.105	43,300.80
	Transcript	8,010.83
	Total	$979,495.63
2. SZABO	Development Agreements (IA)	$649,512.00
	Notes (IIA 1)	$230,183.07
	Leases (IIB 1)	3,617.27
	¶57.105	43,300.80
	Transcript	8,010.83
	Total	$934,623.97
3. HARDY	Development Agreements	$649,512.00
	Notes (IIA 2)	$143,173.86
	Leases (IIB 1)	48,883.93
	¶57.105	43,300.80
	Transcript	8,010.83
	Total	$892,486.42
4. PETERSON	Developmnent Agreements	$324,756.00
	Notes	0.00
	Leases (IIB 2)	2,327.47
	¶57.105	43,300.80
	Transcript	8,010.83
	Total	$378,395.10

ORDER

(Filed June 29, 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION,
Plaintiff,

-v-

GERALD A. MASON, et al.,
Defendants.

ORDER

THIS MATTER has come before the Court on the motion of the Defendants for clarification and/or to amend findings of fact pursuant to Rule 52(b). The Court has reviewed the motion, as well as the opposing papers which have been filed in response. Upon consideration of the motion, in light of the arguments presented and the entire record in this cause, it is

ORDERED AND ADJUDGED that the motion is Denied. The Court's findings are supported by the evidence adduced at the hearing on attorneys' fees.

DONE AND ORDERED this 29th day of June, 1982.

/s/ Edward B. Davis
United States District Court Judge

Copies:

Lee Abrams, Esq.
Andrew Hall, Esq.
Edward Kaufman, Esq.

ORDER OF U. S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, DATED DECEMBER 30, 1980

(Filed December 30, 1980)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 78-2932-CIV-EBD

BURGER KING CORPORATION,
Plaintiff,

-v-

GERALD A. MASON, et al.,
Defendants.

ORDER

THIS MATTER has come before the Court on the motion of the Defendants for a new trial on all issues. A partial new trial has already been ordered as to the damage claims raised in Special Issues Nos. 1 & 2 and several of the franchise termination claims raised in Special Issue No. 5. The Court has reviewed the motion, as well as the opposing papers filed in response. In addition, the Court has had the benefit of oral argument on the matter. Based upon an evaluation of the arguments presented, in light of the entire record in this cause, it is

ORDERED AND ADJUDGED that the Defendants' motion for a new trial on all issues is Denied. There will be a new trial only as to those issues specified in this Court's Order of October 31, 1980.

IT IS FURTHER ORDERED AND ADJUDGED that the parties shall have an additional thirty (30) days from the date previously ordered within which to submit the pretrial stipulation relating to those issues to be litigated in the partial new trial.

DONE AND ORDERED this 30th day of December, 1980.

/s/ Edward B. Davis
United States District Court Judge

Copies Furnished To:

Edward A. Kaufman, Esq.
Lee Abrams, Esq.
Mark Peddecord, Esq.
Andrew C. Hall, Esq.

SPECIAL ISSUE NO. 5

SPECIAL ISSUE NO. 5

With respect to BURGER KING CORPORATION's claims regarding termination of the franchise agreements, we the jury find that:

A. BURGER KING CORPORATION properly terminated all of the franchise agreements,

_____

or

B. BURGER KING CORPORATION wrongfully terminated all of the franchise agreements,

_____

or

(C.) BURGER KING CORPORATION properly terminated the franchise agreements covering the restaurants listed in Column 1 and wrongfully terminated the franchise agreements covering the restaurants listed in Column 2.

1	2
Franchise Agreements Terminated Properly	Franchise Agreements Terminated Improperly
[redacted]	[redacted]
[redacted] None	#463
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	#837
[redacted]	[redacted]
[redacted]	#1127
[redacted]	#1201
[redacted]	[redacted]
[redacted]	#1360
[redacted]	#1689
[redacted]	#179
[redacted]	[redacted]
[redacted]	#1863
[redacted]	#1887
[redacted]	#2024
[redacted]	[redacted]
[redacted]	#2247
[redacted]	#2249
[redacted]	[redacted]